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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 705

PETROLEUM EXPLORATION, INC., APPELLANT,

vs.

**PUBLIC SERVICE COMMISSION OF KENTUCKY
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY**

FILED JANUARY 15, 1938.

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**IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY**

In Equity. No. 1205.

PETROLEUM EXPLORATION, a Maine Corporation,
Complainant,

vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a Kentucky Body
Corporate, J. C. W. Beckham, Thos. B. McGregor and
James W. Cammack, Jr., Defendants

BILL IN EQUITY—Filed July 24, 1937

To the Honorable Hiram Church Ford, Judge of said Court:

Said Petroleum Exploration brings this bill of complaint
against said Public Service Commission of Kentucky, J. C.
W. Beckham, Thos. B. McGregor and James W. Cammack,
Jr., and thereupon complains and says:

First

The full name of the complainant is "Petroleum Ex-
ploration"; it is a corporation organized and existing solely
under the laws of the State of Maine; its principal office
in said state is at 443 Congress Street, in the city of Port-
land, in the southern division of the district of Maine; and
it is duly authorized and qualified to hold property and do
business as a foreign corporation in the state of Kentucky.
[fol. 2] The full names of the said defendants, so far as
known to the complainant, are "Public Service Commission
of Kentucky", "J. C. W. Beckham", "Thos. B. McGregor"
and "James W. Cammack, Jr.", which are the names com-
monly used by said defendants and by which they are com-
monly known.

Said Public Service Commission of Kentucky, hereinafter
called "Commission", is a body corporate created and exist-
ing solely by and under the laws of the state of Kentucky
(Ky. Stat. 3952-2); and its principal office in said state is
in the city of Frankfort, in the eastern district of Kentucky.

Said J. C. W. Beckham, Thos. B. McGregor and James W.
Cammack, Jr., are members of the Commission and are all

the members thereof; and each of them is a citizen of the state of Kentucky and a resident of said city of Frankfort, in the eastern district of Kentucky. Said J. C. W. Beckham is chairman of the said Commission.

Second

The matter in controversy herein, exclusive of interest and costs, exceeds the sum of three thousand dollars, and this suit is wholly of a civil nature and (a) arises under the Constitution and laws of the United States and (b) is between citizens of different states.

Third

The complainant was organized as aforesaid in 1916 for the purpose of exploring for petroleum a large area of land known as the "Miller-Prewitt-Goff (Wells Heirs)" tract, containing some 6,000 acres, more or less, situate in Lee, Wolfe, Powell and Estill counties, in the state of Kentucky. The results of such exploration having proven profitable, the complainant continued its explorations elsewhere in [fol. 3] the state of Kentucky, and in the course thereof discovered valuable deposits of natural gas.

The complainant is now engaged, inter alia, in the operation of lands in Owsley, Jackson, Clay and Knox counties, in the state of Kentucky, for, and the production therefrom of, natural gas. The said gas is contained in porous portions, sometimes called "pay-streaks", of a subterranean stratum or geological horizon called the Corniferous limestone, in isolated and limited areas, sometimes called "fields", and is produced by means of wells sunk thereto from the surface. The complainant's rights to so operate said lands for and produce therefrom the said gas are vested in it by virtue of divers grants from the several land owners, commonly called "oil and gas leases", of which Exhibit A hereto attached, referred to and made part hereof, is typical.

Part of the said gas produced by the complainant from said fields in said Owsley, Jackson and Clay counties, is sold by it to Central Kentucky Natural Gas Company, a corporation, hereinafter sometimes called "Central", and delivered at the corporate limits of the city of Lexington, in the county of Fayette, in the state of Kentucky, pursuant to a written contract dated the 24th day of March, 1937, entered into between said Central and the complainant, a

true copy whereof, marked "Exhibit B", is hereto attached, referred to and made part hereof.

Part of the said gas produced by the complainant from the said fields last mentioned is sold by it to said Central and delivered at the corporate limits of the city of Richmond, in the county of Madison, in the state of Kentucky, and of the city of Irvine, in the county of Estill, in the state of Kentucky, pursuant to a written contract, dated the 7th [fol. 4] day of December, 1927, entered into between one D. L. Johnson and the complainant, a true copy whereof, marked "Exhibit C", is hereto attached, referred to and made part hereof. The rights of the said Johnson under said contract, by virtue of mesne assignments, have come to vest in the said Central.

In addition to said gas produced by the complainant from said Knox county field, it also purchases in said field like gas so produced by others operating therein. All of the said gas so produced from and purchased in said Knox county field is sold by the complainant to the Peoples Gas Company of Kentucky, a corporation, hereinafter sometimes called "Peoples".

A portion of said gas so produced from and purchased in said Knox county field and sold to said Peoples is delivered at the corporate limits of the city of Barbourville, in the county of Knox, in the state of Kentucky, pursuant to a written contract, dated the 17th day of September, 1930, entered into between the said Peoples and the complainant, a true copy whereof, marked "Exhibit D", is hereto attached, referred to and made part hereof. The said contract last mentioned was modified by another written contract, dated the 1st day of December, 1932, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit E", is hereto attached, referred to and made part hereof. Said contract last mentioned as so modified was further modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941 (but the modifications were not formally documented), to provide for a price of 18¢ per 1,000 cubic feet (hereinafter sometimes abbreviated "Mcf") for gas distributed for commercial and industrial use.

The remainder of said gas so produced from and purchased in said Knox county field and so sold to said [fol. 5] Peoples is delivered at the corporate limits of the city of Corbin, in the county of Whitley, in the

state of Kentucky, pursuant to a written contract, dated the 17th day of December, 1930, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit F", is hereto attached, referred to and made part hereof. The said contract last mentioned was modified by another written contract, dated the 29th day of September, 1931, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit G", is hereto attached, referred to and made part hereof. The said contract last mentioned as so modified was further modified by another written contract, dated the 15th day of May, 1933, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit H", is hereto attached, referred to and made part hereof. Said contract last mentioned as so modified was further modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941 (but the modifications were not formally documented), to provide for a price of 18¢ per Mcf for gas distributed for commercial and industrial use.

A part of the said gas produced by the complainant from said Clay county field is sold by it to said Peoples and delivered at the corporate limits of the city of Manchester, in the county of Clay, in the state of Kentucky, pursuant to a written contract, dated the 18th day of April, 1931, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit I", is hereto attached, referred to and made part hereof. Said contract last mentioned was modified by another written contract, dated the 1st day of December, 1932, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit J", is hereto attached, referred to and made part hereof.

[fol. 6] A part of said gas produced by the complainant from said Clay county field is sold by it to said Peoples and delivered at the corporate limits of the city of Somerset, in the county of Pulaski, in the state of Kentucky, pursuant to a written contract, dated the 1st day of November, 1932, entered into between said Peoples and the complainant, a true copy whereof, marked "Exhibit K", is hereto attached, referred to and made part hereof. The said contract last mentioned was modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941 (but the modifications were not formally documented), to pro-

vide for a price of 25¢ per Mcf for gas distributed for commercial and industrial use.

Part of said gas so produced by the complainant from said Clay county field is sold by it to said Peoples and delivered at the corporate limits of the town of Burning Springs, in the county of Clay, in the state of Kentucky, at the price of 25¢ per Mcf. The said arrangement last mentioned is not formally documented.

Part of the said gas produced by the complainant from said Clay county field is sold by it to Edwards & Eversole Gas Company, a co-partnership composed of P. P. Edwards and R. C. Eversole, and delivered at the corporate limits of the city of London, in the county of Laurel, in the state of Kentucky, pursuant to a written contract, dated the 3rd day of July, 1935, entered into between said co-partnership and the complainant, a true copy whereof, marked "Exhibit L", is hereto attached, referred to and made part hereof.

In order to make deliveries as aforesaid of the complainant's said natural gas so sold to said Central, Peoples and Edwards & Eversole Gas Company, the complainant has constructed or purchased and maintains transmission lines [fol. 7] as follows:

(1) From said Owsley-Jackson-Clay county fields, to the corporate limits of said city of Lexington, with branch lines to the corporate limits of said cities of Richmond and Irvine.

(2) From said Clay county field to the corporate limits of said city of Somerset, with branch lines to the corporate limits of said cities of Manchester and London and said town of Burning Springs.

(3) From said Knox county field to the corporate limits of said cities of Barbourville and Corbin.

The said transmission lines are of metal pipe buried in the ground and laid through lands pursuant to grants from the land owners, commonly called "rights-of-way", of which Exhibits M and N hereto attached, referred to and made part hereof are typical. The said transmission lines separately mentioned in sub-paragraphs (1), (2) and (3) last above are not inter-connected and are independently operated.

The complainant does not sell nor offer to sell natural gas to the public; nor does it transmit nor offer to transmit

natural gas for the public; nor does it transmit gas for any other. All gas passing through its said transmission lines is owned exclusively by the complainant, and is produced by the complainant as aforesaid save for small quantities purchased as aforesaid in said Knox county field.

The said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Lexington pursuant to said contract, Exhibit B, is distributed by said Central in said city pursuant to a franchise granted by said city to said Central, a true copy whereof, marked [fol. 8] "Exhibit O", is hereto attached, referred to and made part hereof. The said franchise was so granted pursuant to the authority conferred on said city by section 164 of the Constitution of the state of Kentucky, after due advertisement, said Central having been the highest and best bidder therefor, and its bid therefor having been accepted by said city. The said franchise became effective from the 28th day of January, 1927, for the term of twenty years thence ensuing. The said franchise, (sections 4, 7, 24 and 25, inter alia) reserved to the parties thereto, that is, the said city of Lexington and said Central, the right to fix the rates to be charged by said Central for gas distributed in said city pursuant to said franchise. Afterwards, on the 7th day of May, 1934, the said city pursuant to said reserved right, by authority of said section 164, in reference to said franchise, in its proprietary capacity, entered into a contract with said Central, fixing the rates to be charged by said Central for gas distributed in said city pursuant to said franchise, effective until the 1st day of March, 1939. A true copy of said contract, marked "Exhibit P", is hereto attached, referred to and made part hereof. This is the same contract affirmed by the Court of Appeals of Kentucky in the cases of said Central versus said city and others and said Central versus Wright, decided September 27, 1935, and reported in 260 Ky. 361, 85 S. W. (2d) 870, and by the Supreme Court of the United States in the case of Wright and another versus said Central and others, decided March 16, 1936, and reported in 297 U. S. 537, 80 L. ed. 850. On the 21st day of May, 1934, said city amended said franchise so as to conform with said contract with respect to said rates. A true copy of the amendatory ordinance, marked "Exhibit Q", is hereto attached, referred to and made part hereof.

[fol. 9] The said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Richmond, pursuant to said contract, Exhibit C, is distributed by said Central in said city pursuant to a franchise granted by said city to said D. L. Johnson, and his assigns, a true copy whereof, marked "Exhibit R", is hereto attached, referred to and made part hereof. The said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, said grantee having been the highest and best bidder therefor, and his bid therefor having been accepted by said city. Said franchise became effective from the 5th day of April, 1928, for the term of twenty years thence ensuing; and by mesne assignments has come to vest in said Central. At the same time, the said city of Richmond, pursuant to said section 164, in reference to said franchise and as parcel thereof (section e inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

Said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Irvine, pursuant to said contract, Exhibit C, is distributed by said Central in said city and in the city of Ravenna adjacent thereto, in the said county of Estill.

The said distribution by said Central in said city of Irvine is pursuant to a franchise granted by said city to said D. L. Johnson and his assigns, a true copy whereof, marked "Exhibit S", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the [fol. 10] authority conferred on said city by said section 164, after due advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city. Said franchise became effective on the 13th day of April, 1927, for a term of twenty years thence ensuing; and by mesne assignments has come to vest in said Central. At the same time, the said city of Irvine, pursuant to said section 164, in reference to said franchise and as parcel thereof (section 4 (b) inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said distribution by said Central in said city of Ravenna is pursuant to a franchise granted by said city to said D. L. Johnson and his assigns, a true copy whereof, marked "Exhibit T", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, said grantee having been the highest and best bidder therefor, and his bid therefor having been accepted by said city. Said franchise became effective on the 10th day of February, 1927, for a term of twenty years thence ensuing; and by mesne assignments has come to vest in said Central. At the same time, the said city of Ravenna, pursuant to said section 164, in reference to said franchise and as parcel thereof (section 4 (b) inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

[fol. 11] The said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Barbourville, pursuant to said contract, Exhibits D and E, is distributed by said Peoples in said city pursuant to a franchise granted by said city to Barbourville Supply Company, a corporation, and its assigns, a true copy whereof, marked "Exhibit U", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, said grantee having been the highest and best bidder therefor, and its bid therefor having been accepted by said city. Said franchise became effective on the 9th day of August, 1921, for a term of twenty years thence ensuing; and by mesne assignments has come to vest in said Peoples. At the same time, the said city of Barbourville, pursuant to said section 164, in reference to said franchise and as parcel thereof (section 5, inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and its assigns, for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Corbin pursuant to said contract, Exhibits F, G and H, is distributed by said Peoples in said city pursuant to franchises granted by said city as follows:

(1) To C. R. Luker and his assigns, a true copy whereof, marked "Exhibit V", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, said grantee having been the high-[fol. 12] est and best bidder therefor, and his bid therefor having been accepted by said city. Said franchise became effective on the 1st day of May, 1928, for a term of twenty years thence ensuing; and by mesne assignments has come to vest in said Peoples. At the same time, the said city of Corbin, pursuant to said section 164, in reference to said franchise and as parcel thereof (section (10) inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and his assigns, for gas distributed in said city pursuant to said franchise, effective during the term thereof.

(2) To the complainant and its assigns, a true copy whereof, marked "Exhibit W", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, the complainant having been the highest and best bidder therefor, and its bid therefor having been accepted by said city. Said franchise became effective on the 10th day of June, 1930, for a term of twenty years thence ensuing; and by mesne assignment has come to vest in said Peoples. At the same time, the said city of Corbin, pursuant to said section 164, in reference to said franchise and as parcel thereof (section (11) inter alia), in its proprietary capacity, entered into a contract with the complainant, fixing the rates to be charged by said complainant and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

[fol. 13] (3) To the complainant and its assigns, a true copy whereof, marked "Exhibit X", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, the complainant having been the highest and best bidder therefor, and its bid therefor having been accepted by said city. Said franchise became effective on the 20th day of January, 1931, for a term of twenty years thence ensuing; and by mesne

assignment has come to vest in said Peoples. At the same time the said city of Corbin, pursuant to said section 164, in reference to said franchise and as parcel thereof (section (11) inter alia), in its proprietary capacity, entered into a contract with the complainant, fixing the rates to be charged by said complainant and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Manchester, pursuant to said contract, Exhibits I and J, is distributed by said Peoples in said city pursuant to a franchise granted by said city to the complainant and its assigns, a true copy whereof, marked "Exhibit Y", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, the complainant having been the highest and best bidder therefor, and its bid therefor having been accepted by said city. Said franchise became effective on the 24th day of February, 1931, for a term of twenty years thence ensuing; and by mesne assignment has come to vest in said Peoples. At the [fol. 14] same time, the said city of Manchester, pursuant to said section 164, in reference to said franchise and as parcel thereof (section (10) inter alia), in its proprietary capacity, entered into a contract with the complainant, fixing the rates to be charged by it and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Somerset, pursuant to said contract, Exhibit K, is distributed by said Peoples in said city pursuant to a franchise granted by said city to W. H. Young and his assigns, a true copy whereof, marked "Exhibit Z", is hereto attached, referred to and made part hereof. Said franchise was so granted pursuant to the said authority conferred by said section 164, after due advertisement, the said grantee having been the highest and best bidder therefor, and his bid therefor having been accepted by said city. Said franchise became effective on the 8th day of August, 1932, for a term of twenty years thence ensuing; and by mesne assignment has come to vest in said Peoples. At the same time, the said

city of Somerset, pursuant to said section 164, in reference to said franchise and as parcel thereof (section (11) inter alia), in its proprietary capacity, entered into a contract with the said grantee, fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said gas so sold and delivered to said Edwards & Eversole Gas Company by the complainant at the corporate limits of said city of London, pursuant to said contract, [fol. 15] Exhibit L, is distributed by said Edwards & Eversole Gas Company in said city pursuant to a franchise granted by said city to C. R. Luker and his assigns, a true copy whereof, marked "Exhibit AA", is hereto attached, referred to and made part hereof. The said franchise was so granted pursuant to the authority conferred on said city by said section 164, after due advertisement, said grantee having been the highest and best bidder therefor, and his bid therefor having been accepted by said city. Said franchise became effective on the 8th day of September, 1928, for a term of twenty years thence ensuing; and by mesne assignments has come to vest in said Edwards & Eversole Gas Company. At the same time, the said city of London, pursuant to said section 164, in reference to said franchise and as parcel thereof (section 10 inter alia), in its proprietary capacity, entered into a contract with the grantee, fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof.

The said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said town of Burning Springs, is distributed by said Peoples in said town without, so far as is known to the complainant, any formal franchise therefor.

Said Peoples has outstanding 1,280 shares of its common capital stock of the par value of \$25.00 each, of which the complainant is the owner of 1,000 shares. So far as is known to the complainant, the remaining 280 shares of said outstanding stock are owned as follows:

[fol. 16]

Stockholder	Address	Shares
John T. Bishop, Jr.	Basin, Wyoming	20
Marion C. Bishop	"	20

Stockholder	Address	Shares
Helen Goodwin	Care Mrs. E. A. Durham, Sistersville, W. Va.	15
Mary V. Fisk	"	15
Elizabeth Brand	"	15
Ada B. Durham	Sistersville, W. Va.	50
Marjorie D. McLain	Garden City, N. Y.	20
E. Arthur Durham, Tr.	Sistersville, W. Va.	25
Edwin A. Durham, Inc.	"	100

Said Peoples is indebted to the complainant in the sum of some \$200,000.00.

No affiliation, domination or control whatsoever, direct or indirect, immediate, intermediate or remote, exists or has ever existed between the complainant and (1) said Central, or (2) said D. L. Johnson, or any of his assigns, or (3) said Edwards & Eversole Gas Company, or either of said members thereof. Each of the said contracts between the complainant and (1) said Central, Exhibit B, (2) said D. L. Johnson, Exhibit C, and (3) said Edwards & Eversole Gas Company, Exhibit L, was negotiated and entered into between strangers at arm's length.

The General Assembly of the Commonwealth of Kentucky passed an act (1934, c. 145; as amended 1936, c. 92—Ky. Stat. 3952-1 to 3952-61, inclusive) originally effective on the 14th day of June, 1934, establishing the said Commission and giving it regulatory authority in the public interest over certain "utilities" therein defined, inter alia, as follows (Ky. Stat. 3952-1 (c)):

[fol. 17] " * * * corporations * * * that now or may hereafter own, control, operate or manage * * * any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of the same, for light, heat, power or other uses; any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *"

Said act further provides (Ky. Stat. 3952-27):

"The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and pro-

mulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise, between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules or service standards shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed, nor any contract or agreement effecting same shall be abrogated or changed until [fol. 18] and after a hearing has been had before the commission in the manner prescribed in this act.

“Nothing in this section or elsewhere in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.”

The said provision of said act last above quoted insofar as it seeks to limit the power of a municipality to contract, in its proprietary capacity, with a utility, in reference to a franchise granted to such utility, with respect to rates, is contrary to sections 163 and 164 of the Constitution of Kentucky (as construed in numerous decisions of the Court of Appeals of Kentucky) vesting in cities and towns exclusive authority to grant franchises for the use of their streets, alleys and other public grounds for the distribution of gas and other commodities, and to contract in a proprietary capacity with the grantee, in reference to any such franchise, with respect to rates.

Said provision of said act last above quoted insofar as it undertakes to vest in said Commission regulatory jurisdiction of the rates to be charged by said Central in said city of Lexington, said city of Richmond, said city of Irvine and said city of Ravenna, and by said Peoples in said city of Barbourville, said city of Corbin, said city of Manchester and said city of Somerset and by said Edwards & Eversole Gas Company in said city of London, impairs the obligation of the several rate contracts entered into respectively between said cities and said distributors, in reference to their respective franchises, being said Exhibits

O, P, Q, R, S, T, U, V, W, X, Y, Z and AA, in contravention of the contract clause (article 1, section 10, clause 1) of the Constitution of the United States, and the contract clause (section 19) of the Constitution of Kentucky.

On the — day of —, 1937, the said Commission served on the complainant by registered mail a copy of an order whereof the following is a true copy:

“BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

“A meeting of the Public Service Commission was this day held; present: Commissioners Cammack and McGregor.

• • • • •

Case No. 396

In the Matter of Investigation on Motion of the Commission of the Rates, Rules and Practices of the Petroleum Exploration, Inc.

“Notice of Investigation and Order to Show Cause

“Whereas, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

“Whereas, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

“Whereas, It is apparent from a comparison of these rates with those of other companies rendering a similar [fol. 20] class of service in Kentucky that these rates may be excessive; and

“Whereas, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine-Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

“Whereas, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"Now, Therefore, Notice is Hereby Given, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"Whereas, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"Now, Therefore, it is Ordered:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which [fol. 21] it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

"2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

"3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust, association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed [fol. 22] classification of such charges showing separately each class of service and the charges therefor and amounts cleared to each account.

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"Notice is Hereby Given to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937.

(S.) Chas. J. White, Secretary. (Seal.)"

There is not now and never was any contract, agreement or working arrangement as mentioned in paragraph "2" of the above-quoted order; nor any charge, payment or obligation as mentioned in paragraph "3" thereof.

On the 29th day of June, 1937, complainant by its agents and attorneys appeared before the said Commission and tendered a plea to its jurisdiction, a copy whereof, marked "Exhibit BB", is hereto attached, referred to and made part hereof. Nothing in the way of traverse or avoidance was filed or testified to in opposition to said plea. Notwithstanding, by order entered on or as of said 29th day of June, 1937, said plea was summarily overruled. Thereafter a copy of said order last mentioned was served by the said Commission on the complainant by registered mail on the 3rd day of July, 1937, whereof the following is a true copy:

[fol. 23] "BEFORE THE PUBLIC SERVICE COMMISSION OF
KENTUCKY

"A meeting of the Public Service Commission was held on this date; present: Chairman Beckham, Commissioners Cammack and McGregor.

• • • • •

Case No. 396

In the Matter of Investigation on Motion of the Commission of the Rates, Rules and Practices of the Petroleum Exploration, Inc.

"Order

"This cause coming on to be heard on the plea of the Petroleum Exploration, Inc., to the jurisdiction of the Com-

mission and it appearing to the Commission that the Petroleum Exploration, Inc., is engaged in the business of producing, selling and delivering natural gas to various utility companies, which sell and distribute the same to the public in Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown, all of which towns and all communities are in Kentucky; and it further appearing that the Petroleum Exploration, Inc., owns, controls, operates, and manages facilities used in connection with the production, storage, distribution, sale, and furnishing to and for the public for compensation natural gas for light, heat, power, and other purposes and owns and controls facilities used in connection with the transporting and conveying of gas by pipe line to and for the public for compensation; and it further appearing that the Petroleum [fol. 24] Exploration, Inc., is a 'utility' under sections 3952-1-12-13-14 of the Kentucky Statutes; and the Commission being advised,

"It is Ordered, That the plea to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that the demurrer to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that this action be and hereby it is set down for formal hearing on Thursday, July 29, 1937, at 10:00 A. M., on the notice of investigation and order to show cause issued by the Commission herein on May 29, 1937, to all of which the Petroleum Exploration, Inc., objects and excepts.

"This the 29th day of June, 1937.

"Public Service Commission of Kentucky, (S.) J. C. W. Beckham, Chairman. (S.) James W. Cammack, Jr., Commissioner. (S.) Thos. B. McGregor, Commissioner. (Seal.)

Attest: (S.) Chas. J. White, Secretary."

Thereafter, on the 20th day of July, 1937, pursuant to the provisions of said act (Ky. Stat. 3952-36), the complainant again appeared before said Commission, by its attorney, and filed its application for a rehearing, together with an

amended and supplemental plea to the jurisdiction of said Commission. True copies of said application, marked "Exhibit CC", and of said amended and supplemental plea, [fol. 25] marked "Exhibit DD", are hereto attached, referred to and made part hereof.

Though the said Commission has not yet ruled upon said application and amended and supplemental plea, so the complainant is informed and believes, said Commission intends and threatens, said application and amended and supplemental plea notwithstanding, to proceed with said unlawful, unreasonable and useless investigation, case No. 396, on the 29th day of July, 1937, and thereafter.

It is the obvious purpose of the said Commission to attempt to lower some or all of the prices at which the complainant, pursuant to the aforesaid contracts, sells and delivers gas to said Central, said Peoples and said Edwards & Eversole Gas Company, respectively, as none of the latter has been made party to said attempted investigation, case No. 396, as would be the case if the said Commission contemplated attempting to raise some or all of said prices. The complainant is the sole respondent to said attempted investigation, case No. 396.

The said Commission is without power to reduce the said prices for said gas so sold and delivered to said Central for distribution in said cities of Lexington, Richmond, Irvine and Ravenna; to the said Edwards & Eversole Gas Company for distribution in said city of London; and to said Peoples for distribution in said cities of Barbourville, Corbin, Manchester and Somerset, the distribution rates wherefor are fixed by said contracts not subject to the regulatory jurisdiction of the said Commission as hereinabove set forth, as any reduction of any of the said prices so charged by the complainant to the said respective distributors for said gas so sold and delivered would not be in the public [fol. 26] interest or for the public benefit but solely for the private interest and benefit of said respective distributors, or some of them, thereby (1) depriving the complainant of its property without due process of law and denying to it the equal protection of the laws contrary to the 14th amendment (section 1) of the Constitution of the United States, and (2) impairing the obligation of its several contracts, above mentioned, for the sale and delivery of said gas to said respective distributors contrary to the said contract clauses of the Constitutions of the United States and Kentucky.

Independently of said respective contracts fixing the distribution rates for gas in said cities of Lexington, Richmond, Irvine and Ravenna of said Central and in said city of London of said Edwards & Eversole Gas Company, the said respective contracts between the complainant and each of said distributors for the sale and delivery of gas for such distribution are not subject to the regulatory jurisdiction of said Commission, and any reduction of any of the prices fixed by said last mentioned contracts would deprive the complainant of its property without due process of law, deny it the equal protection of the laws, and impair the obligation of its said contracts, contrary to the constitutional limitations aforesaid.

Independently of said respective contracts fixing the distribution rates for gas in said cities of Barbourville, Corbin, Manchester and Somerset of said Peoples, the said respective contracts between the complainant and said distributor for the sale and delivery of gas for such distribution are not subject to the direct regulatory jurisdiction of said Commission.

[fol. 27] As stated above, the complainant delivers gas at the corporate limits of said cities of Corbin, Somerset, Barbourville, Manchester, Richmond, Irvine, Ravenna, London and Lexington and of said town of Burning Springs, at wholesale for distribution therein by the respective local utilities above named. It does not deliver gas at or for distribution in said "towns and communities" of Winchester, Mt. Sterling, Cynthiana, Georgetown, Paris, Frankfort, Versailles, Midway, or North Middletown, as set forth in said Commission's orders above quoted.

The complainant's remaining investment in its said natural gas production and transmission properties amounts to a large sum, in round numbers, \$1,500,000.00, and the actual value of said properties exceeds said sum.

The cost and expense to the complainant to "show conclusively the fairness and reasonableness of its present rates and charges for gas" as required by said order of May 29, 1937, above quoted, giving "due consideration to (its) * * * history and development * * * and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes" as required by said act (Ky. Stat. 3952-19), would be, in round numbers, the sum of \$25,000.00.

The said investigation, case No. 396, and the said orders entered therein, that is, of the 29th days of May and June, respectively, 1937, above quoted, are unlawful, unreasonable and arbitrary; and if said investigation and said orders are further prosecuted the complainant will be put to unlawful and needless expense in a great sum, to-wit, the sum of \$25,000.00, for the recovery of which it will have no [fol. 28] adequate remedy and its loss thereby occasioned will be irreparable. The pretended findings in said orders are arbitrary and are not based upon any evidence adduced before the said Commission after notice to the complainant.

Fourth

The said Central Kentucky Natural Gas Company (herein sometimes called "Central") is a corporation organized and existing solely under the laws of the state of Kentucky with an office at said city of Lexington, in the eastern district of Kentucky. The said Peoples Gas Company of Kentucky (herein sometimes called "Peoples") is a corporation organized and existing solely under the laws of the state of Delaware, duly authorized and qualified to hold property and do business as a foreign corporation in the state of Kentucky, with an office in said city of Lexington, in the eastern district of Kentucky. Each of said P. P. Edwards and R. C. Eversole, composing said co-partnership, Edwards & Eversole Gas Company, is a citizen of the state of Kentucky and a resident of the eastern district of Kentucky. The complainant is not advised that any of them is a necessary party to this suit but offers to implead all or any of them herein should the Court so direct.

Fifth

Wherefore, the complainant prays:

(1) That the Court do issue its writ of subpoena, in due form of law and according to the course and practice of the Court, directed to the said Public Service Commission of Kentucky, J. C. W. Beckham, Thos. B. McGregor and James W. Cammack, Jr., the defendants as aforesaid, commanding them and each of them at a certain day and under a certain penalty to be therein specified to appear before [fol. 29] the Court to answer under oath all and singular the matters and things hereinbefore set forth and com-

plained of and to stand by and abide and perform all the orders and decrees of the Court herein.

(2) That the Court do grant the complainant its writ of injunction, during the pendency hereof and perpetually thereafter, directed against the said Public Service Commission of Kentucky, and said J. C. W. Beckham, Thos. B. McGregor, and James W. Cammack, Jr., as members thereof, their attorneys and agents, and all other persons acting under their authority, from further prosecuting against the complainant the said attempted investigation, case No. 396, severally in respect of:

(a) The price for gas charged by the complainant to said Central according to the terms and provisions of said contract (Lexington) of the 24th day of March, 1927, said Exhibit B.

(b) The price for gas charged by the complainant to said Central according to the terms and provisions of said contract (Richmond, Irvine and Ravenna) of the 7th day of December, 1927, said Exhibit C.

(c) The price for gas charged by the complainant to said Peoples according to the terms and provisions of said contract (Barbourville) of the 17th day of September, 1930, said Exhibit D, as modified as aforesaid.

(d) The price for gas charged by the complainant to said Peoples according to the terms and provision- of said contract (Corbin) of the 17th day of December, 1930, said Exhibit F, as modified as aforesaid.

(e) The price for gas charged by the complainant to said Peoples according to the terms and provisions of said contract [fol. 30] tract (Manchester) of the 18th day of April, 1931, said Exhibit I, as modified as aforesaid.

(f) The price for gas charged by the complainant to said Peoples according to the terms and provisions of said contract (Somerset) of the 1st day of November, 1932, said Exhibit K, as modified as aforesaid.

(g) The price for gas charged by the complainant to said Edwards & Eversole Gas Company according to the terms and provisions of said contract (London) of the 3rd day of July, 1935, said Exhibit L.

(3) That pending the hearing for an interlocutory injunction the Court do grant to the complainant a temporary order directed against the said Public Service Commission of Kentucky and said J. C. W. Beckham, Thos. B. McGregor, James W. Cammack, Jr., as members thereof, their attorneys and agents, and all other persons acting under their authority, restraining them as aforesaid.

(4) That said order of said Commission of or as of the 29th day of June, 1937, above quoted, be vacated and set aside.

(5) And that the complainant may have such other and further relief as the nature of the case may require.

Petroleum Exploration, by L. E. Gregg, Secretary.
Edward C. O'Rear, Allen Prewitt, of Frankfort,
Kentucky; W. J. Brennan, of Sistersville, West
Virginia, Counsel for the Complainant.

[fol. 31] *Duly sworn to by L. E. Gregg. Jurat omitted in printing.*

[fol. 32] AGREED CONDENSED STATEMENT OF EXHIBITS TO BILL
OF COMPLAINT

EXHIBIT A

Exhibit A is a typical "oil and gas lease". By such instrument, the private land owner, as "lessor", grants unto Petroleum Exploration, a corporation, as "lessee", all the oil and gas in and under, and demises a described boundary of, land for the purpose of operating for and producing oil, gas and gasoline. The term is for a period of five years from the date of the instrument and as much longer as oil, gas or gasoline is produced from the premises, yielding the lessor one-eighth of the oil, as royalty, with the provision that if a well be found producing gas only, the lessor should be paid for gas produced at a stipulated rate annually.

EXHIBIT B

This is a written agreement made March 24, 1927, between Petroleum Exploration, a corporation organized under the laws of the State of Maine, and Central Kentucky Natural Gas Company, a Kentucky corporation. Begin-

ning within one year, Petroleum Exploration agreed to sell and deliver at the measuring station of the Central Kentucky Natural Gas Company, just outside the corporate limits of the city of Lexington, Kentucky, provided it could supply so much from its gas fields or other sources, and Central Kentucky Natural Gas Company agreed to buy, a total of 750,000,000 cubic feet of natural gas annually at the price of 40¢ per 1,000 cubic feet, payment to be made monthly. It was provided that the contract should expire February 20, 1947.

[fol. 33]

EXHIBIT C

This is a written agreement made December 7, 1927, between said Petroleum Exploration and one D. L. Johnson, of Lexington, Kentucky. As seller, Petroleum Exploration agreed to deliver to Johnson, as buyer, at the corporate limits of Irvine and Richmond 25,000,000 cubic feet of natural gas annually, subject to its obligations under its contract with the Central Kentucky Natural Gas Company, and which amount Johnson agreed to take. The stipulated price was 40¢ per 1,000 cubic feet. It was provided that the contract should terminate on February 20, 1947.

EXHIBIT D

Exhibit D is a written contract made September 17, 1930, between said Petroleum Exploration, as seller, and Peoples Gas Company, as buyer. Beginning November 1, 1930, the seller agreed to deliver to the buyer immediately without the boundaries of the corporate limits of Barbourville, Kentucky, an estimated maximum amount of 25,000,000 cubic feet of gas per year, at the price of 30¢ per 1,000 cubic feet for gas produced from the seller's Knox County, Kentucky, field and 35¢ per 1,000 cubic feet for gas produced from the seller's Clay County, Kentucky, field. Gas was to be delivered from the Clay County field only in the event of a deficiency of supply from the Knox County source. It was provided that the contract should terminate August 9, 1941.

[fol. 34]

EXHIBIT E

Exhibit E. is a written agreement made December 1, 1932, between said Petroleum Exploration and Peoples Gas Company of Kentucky. It modified Exhibit D. by re-

ducing the price of gas from Knox County from 30¢ to 25¢ per 1,000 cubic feet.

EXHIBIT F

Exhibit F. is a written agreement between said Petroleum Exploration and said Peoples Gas Company of Kentucky made September 17, 1930. Provided it could deliver so much from its Knox and Clay County natural gas fields, and as seller, Petroleum Exploration agreed to deliver to Peoples Gas Company of Kentucky, as buyer, all natural gas needed by the latter to supply its consumers in the town of Corbin, Kentucky, estimated at 100,000,000 cubic feet annually, delivery to be made at the edge of the town. For gas delivered from the seller's Knox County field the stipulated price was to be 30¢ per 1,000 cubic feet and that from the seller's Clay County field 35¢, to be delivered only in the event of a deficiency of supply from the Knox County source. Deliveries were to begin on or before January 1, 1932, and the contract was to terminate on August 8, 1950.

EXHIBIT G

Exhibit G. is a written instrument made September 29, [fol. 35] 1931, between said Petroleum Exploration and said Peoples Gas Company of Kentucky. It modified the prices fixed by Exhibit F. providing that the price for gas from the seller's Knox County field should be equivalent to 50% of the buyer's domestic rate for gas in the city of Corbin and its suburbs and not less than 15¢ per 1,000 cubic feet. The modification was to remain in effect only for one year, beginning October 1, 1931, and ending September 30, 1932.

EXHIBIT H

Exhibit H. is a written agreement between said Petroleum Exploration and Peoples Gas Company of Kentucky made May 15, 1933. It further modified Exhibit F. for sale and delivery of gas at the city limits of Corbin, Kentucky, by reducing the price of gas from the seller's Knox County field from 30¢ to 25¢ per 1,000 cubic feet.

EXHIBIT I

Exhibit I. is a written agreement made between the same parties April 18, 1931. Beginning October 1, 1931, Petro-

leum Exploration, as seller, agreed to deliver to Peoples Gas Company, as buyer, just outside the corporate boundaries of the town of Manchester, Kentucky, the amount of natural gas necessary for the purposes of the buyer in supplying its customers in said town and its suburbs. The agreed price was 30¢ per 1,000 cubic feet, and the contract was to terminate March 21, 1951.

EXHIBIT J

Exhibit J. is a written agreement between the same parties made December 1, 1932. It reduced the price of gas delivered by the seller at the city limits of Manchester, Kentucky, from 30¢ to 25¢ per 1,000 cubic feet.

[fol. 36]

EXHIBIT K

Exhibit K. is a written agreement made November 1, 1932, between said Petroleum Exploration, as seller, and said Peoples Gas Company of Kentucky, as buyer. Provided it could furnish so much from its oil and gas leaseholds in Clay County and Knox County, Kentucky, the seller agreed to deliver to the buyer at the city limits of Somerset, Kentucky, the buyer's needs and requirements of natural gas for distribution in said city. The agreed price was 30¢ per 1,000 cubic feet, beginning July 1, 1933, and ending October 31, 1937. Thereafter the seller might demand an increase, which if the buyer was not willing to concede should be determined by arbitrators in the manner provided by the contract. It was provided that the contract should terminate September 12, 1952.

EXHIBIT L

Exhibit L is a written agreement between said Petroleum Exploration, as seller, and P. P. Edwards and R. C. Eversole, as buyers, made July 3, 1935. The seller agreed to deliver to the buyer just outside the corporate limits of the town of London, Kentucky, and the buyer agreed to take 10,000,000 cubic feet of natural gas annually so long as the seller's pipe line to Somerset, Kentucky, could furnish so much after supplying said Peoples Gas Company of Kentucky. Subject to these conditions, the seller agreed to supply the buyer such additional quantities of natural gas as they might desire. The agreed price was 30¢ per 1,000 cubic feet, subject to a reduction of 5¢ for such gas the seller could

supply from its Knox County, Kentucky, gas field. Deliveries were to begin September, 1935. The contract was to terminate September 1, 1947.

[fol. 37]

EXHIBIT M

Exhibit M. is a typical form of pipe line right-of-way agreement by which for a stated consideration the land owner sold, granted and conveyed unto said Petroleum Exploration, its successors and assigns forever, the right-of-way for, and the right from time to time to lay, re-lay and maintain pipe lines over the land owner's described premises.

EXHIBIT N

Exhibit N. is the same as Exhibit M. except that it provides for arbitrating any damages which may occur to the land owner's crops and fences from the construction or operation of the pipe line.

EXHIBIT O

Lexington, Kentucky, Gas Franchise

Exhibit O. is an ordinance adopted by the Board of Commissioners of the city of Lexington, Kentucky, January 28, 1927. It directed the Mayor of the city to sell the franchise thereby created. It authorized the purchaser to occupy the streets, alleys and public places of the city of Lexington, Kentucky, with a natural or manufactured or "mixed" gas distribution system for the term of the franchise, beginning January 28, 1927, and ending 20 years thereafter. It authorized the purchaser to promulgate its rates, charges and compensation for the sale of natural gas, but provided that the city might contest the justness and reasonableness of such rates before the Railroad Commission of Kentucky as provided in Sections 201e-1 to 201e-20 of the Kentucky Statutes. Pending the determination of such controversy, it was provided that the purchaser might charge not for natural gas exceeding 50¢ per 1,000 cubic feet until the company procured additional pipe line facilities, after which [fol. 38] it might charge 60¢ per 1,000 cubic feet, but provided for impounding 10¢ thereof until the final determination of said rate controversy. It was provided that said franchise should be sold at public auction in the city of Lex-

ington, to the highest and best bidder, but for not less than \$15,000.

EXHIBIT P

Resolution No. 74

This is a written agreement in the form of a resolution adopted by the Board of Commissioners of the city of Lexington, Kentucky, May 7, 1934, between the city of Lexington, Kentucky, and the Central Kentucky Natural Gas Company, purchaser of the franchise filed as Exhibit O. It expressed the desire of said parties to settle and compromise all matters in dispute respecting the rate to be charged for gas under said franchise. It recites that this controversy had been pending in the Fayette Circuit Court, in the Railroad Commission of Kentucky, in the United States District Court and in the United States Supreme Court and was yet undetermined. It further provided as follows:

“First. That the Central Kentucky Natural Gas Company shall have the right, from and after the passage and effective date of an amendatory of said Ordinance Number 3346, conforming hereto and until March 1st., 1939, and until [fol. 39] same are altered as provided under said original franchise, or by law, and on all bills rendered, based on meter readings on and after the passage and effective date of said amendatory ordinance, to charge, demand, collect and receive for its natural gas, that may be supplied as under the terms of said franchise, the following rates for natural gas consumed in any one month:

- 50 cents for the first 100 cubic feet or less.
- 52 cents per M for the next 3900 cubic feet.
- 50 cents per M for the next 4000 cubic feet.
- 45 cents per M for the next 17000 cubic feet.
- 43 cents per M for all over 25000 cubic feet.

“In the event the Federal, State, County or Municipal Government, or any taxing district, shall impose any direct tax on the production or sale of gas, the amount of such tax or taxes paid by the Company on the production or sale of gas sold in the City of Lexington shall be apportioned, at the time of the payment thereof, among the consumers in Lexington on the basis of the amount of gas consumed by them and upon which such tax was paid, and be added to the

next monthly bills rendered to said consumers after said tax is paid.

"The Company shall have the right to charge, in addition [fol. 40] to the schedule rates hereinabove set out, three cents (3 cents) per one thousand (1,000) cubic feet or fraction thereof, if the bill for service is not paid within ten days after said bill is mailed or delivered to the customer.

"From and after March 1st., 1939, and until the expiration of said twenty year franchise contract, the Company shall have the right to charge, demand, collect, and receive for its gas service under the franchise just and reasonable rates, charges and compensation, and in the event the City and Company are unable to agree upon a rate to be charged by the Company for its gas service after the expiration of said fixed rate period, they shall proceed as provided for in Sections 201e-1 to 201e-20, inclusive, of the Kentucky Statutes, or in such other manner as the statute law may then provide, or as may be open in the Courts.

"Second. That all money now impounded under orders of said courts and in the proceedings before the Railroad Commission, shall, with the consent of said Court, or courts, or Commission, be made available and subject to the check of the Company, and by it distributed as follows:

(1) To the consumers, who paid in, at the rate of five cents per thousand cubic feet on all gas sold since December 1st., 1927.

(2) To the Company the remaining funds. Said distribution of said funds shall commence within thirty (30) [fol. 41] days from the effective date of said amendatory ordinance and be completed as soon as is practicably possible.

"The Company shall pay:

(a) All cost of distribution.

(b) To the City of Lexington to partly reimburse it for the expense of the said rate litigation, \$35,000.00.

(c) To J. A. Edge, Attorney for the Gas Consumers' League, the sum of \$22,500.00 to cover cost, fees and expenses of the League, including fees for the attorneys at Washington, D. C., who represented the League before the United States Supreme Court.

(d) All unpaid receiver or custodian fees, as finally allowed.

(e) All unpaid court costs, and costs of said proceedings before the Railroad Commission in said rate litigations; and the City is acquitted of all further liability as to costs.

(f) Any part of said impounded funds going to the consumers and unclaimed by said consumers by January 1st., 1935, shall be covered one-half thereof into the Treasury of the City of Lexington and the other half thereof to be regained by the Central Kentucky Natural Gas Company; with the understanding and agreement that as to any lawful and rightful claims therefor duly presented in the future, [fol. 42] the City and the Central Kentucky Natural Gas Company shall each pay one-half thereof.

The Company shall, at the time said refund payments are made to said customers, render to each of them an itemized statement by months showing basis of said refund. A copy of said statement shall be kept on file by the Company.

"Third. Ordinance Number 3346, pursuant to which said Company purchased its present franchise, shall be so amended as to carry into effect the terms hereof; but said ordinance shall not be so amended until the Central Kentucky Natural Gas Company and its counsel and the Gas Consumers' League and their counsel shall, by an endorsement upon a copy of this resolution, have signified its concurrence in, and its agreement to the terms and conditions in this resolution set forth.

"Fourth. Appropriate agreed orders shall be entered in said court or upon said Commission, settling and dismissing said proceeding in conformity to these terms and conditions."

EXHIBIT Q

"Ordinance No. 271

An Ordinance to Amend and Reenact Sections 4 and 7 of Ordinance No. 3346, Passed by the Board of Commissioners January 28, 1927, so as to Provide and Fix the Rate at Which Natural Gas May be Sold to the Citizens of Lexington.

[fol. 43] "Be it Ordered By the Board of Commissioners of the City of Lexington:

"Section 1. That Section 4 of Ordinance No. 3346 passed by the Board of Commissioners of the City of Lexington January 28, 1927, be, and the same hereby is, amended and reenacted so that the same, when so amended and reenacted, shall read as follows:

"Section 4. The Company shall have the right from and after the effective date of this amendatory ordinance and until March 1, 1939, and until same are altered as provided under this franchise, or by law, and on all bills rendered based on meter readings on and after the effective date of this amendatory ordinance to charge, demand, collect and receive for its natural gas that may be supplied under the terms of this franchise, the following rates for natural gas consumed in any one month:

50 cts. for the first 100 cubic feet or less.

52 cts. per M. for the next 3900 cubic feet.

50 cts. per M. for the next 4000 cubic feet.

45 cents per M. for the next 17000 cubic feet.

43 cts. per M. for all over 25000 cubic feet.

"Section 2. That Section 7 of Ordinance No. 3346 passed by the Board of Commissioners of the City of Lexington January 28, 1927, and the same hereby is, amended and [fol. 44] reenacted so that the same, when so amended and reenacted shall read as follows:

"Section 7. From and after March 1st, 1938, and until the expiration of this twenty year franchise contract, the Company shall have the right to charge, demand, collect and receive for its natural gas under the franchise just and reasonable rates, charges and compensation, and in the event the City and the Company are unable to agree upon a rate to be charged by the Company for its gas service after the expiration of said fixed rate period, they shall proceed as provided for in Sections 201e-1 to 201e-20, inclusive, of the Kentucky Statutes, or in such other manner as the statute law may then provide, or as may be open in the courts.

"3. This ordinance shall take effect ten days after the same is signed, recorded and published as required by law.

Introduced May 14th, 1934.

Passed Board of Commissioners May 21, 1934, in the same form as introduced.

W. T. Congleton, Mayor.

Attest: Ben Herr, City Clerk.

Published May 22, 1934."

EXHIBIT R

Richmond, Kentucky, Franchise

This is an ordinance adopted by the Common Council of [fol. 45] the city of Richmond, Kentucky, April 5, 1928. It defined and created a franchise for the occupancy of the streets and public places of the City of Richmond, Kentucky, with a gas distribution system for the purpose of supplying consumers with natural gas. It was to become effective April 5, 1928, and to expire February 20, 1947. It directed the Mayor to sell such franchise at public auction to the highest and best bidder. It further provided:

"Said purchaser or purchasers, successors or assigns, shall have the right to charge, receive and collect rates and charges not in excess of the following to-wit:

(1) A service charge of twenty-five (25) cents net per meter per month, said charge to cover no part of the gas consumed.

(2) Sixty-eight (68) cents per thousand for each of the first ten thousand cubic feet of gas consumed in any one month, subject to a discount of three (3) cents per thousand cubic feet, on all consumers' bills paid on or before the tenth of the month following that in which the gas shall have been delivered.

(3) Sixty-three (63) cents for each one thousand cubic feet of gas over and above the first ten thousand cubic feet consumed in any one month with a discount of (3) three cents per thousand cubic feet if consumers' bill is paid on or before the tenth of the following months."

The purchaser agreed to furnish certain specified natural gas service.

Irvine, Kentucky, Gas Franchise

This is an ordinance adopted by the city of Irvine, Kentucky, April 13, 1927. It directed the Mayor of the city to sell the franchise thereby created at public auction to the highest and best bidder, but for not less than \$100.00. It granted the purchaser the right to occupy the streets and public places of the city of Irvine with a natural or manufactured or "mixed" gas distribution system for a period of 20 years, beginning April 13, 1927. It gave the purchaser, known as "the company", the following rights during that term:

"(A) The Company shall have the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation hereinafter provided.

"(B) From and after the date when this franchise becomes effective, the Company shall charge, demand, collect and receive sixty-five (65) cents per thousand cubic feet for natural gas, artificial or mixed gas consumed by the customers in the city of Irvine, Kentucky. But purchaser shall have the right to furnish said gas to any manufacturer or industrial enterprise at a less rate.

"(C) When a bill for gas service is not paid for by a customer within ten days after said bill is mailed or delivered to said customer, the Company may charge, demand, collect and receive a further sum of five (5) cents per thousand cubic feet. The rates, charges or compensation to be [fol. 47] charged, demanded, received or collected shall be net and shall not be increased by any meter rental, service charge or other device of any kind or description.

"(D) The Company shall have the right to require from each and every consumer of gas before gas service is installed a deposit of twice the amount of an estimated monthly gas bill which said deposit may be retained by the Company until gas service is discontinued, and all bills paid by the customer, or a bond or other security, as the Company may determine, to guarantee the payment of any such gas bill or bills. The Company shall have the right to discontinue the service to any customer who fails to pay his

bills within ten (10) days after said account is due and the bill has been rendered.

“(E) The Company shall not be required to bear the expense of making service connections from their main lines located at the curbs, or in the alleys as the case may be; to the property of the customer, but shall have the right at the time such connection is being made to thoroughly inspect the service and meter. Then and thereafter the Company shall at all times have the right to inspect such service lines, meters and to read and repair same when necessary.”

The purchaser agreed to furnish certain specified gas service.

EXHIBIT T

Ravenna, Kentucky, Gas Franchise

[fol. 48] This is an ordinance adopted by the Board of Councilmen of the city of Irvine, Kentucky, on February 10, 1927. It directed the Mayor of the city to sell at public auction to the highest and best bidder, but for not less than \$100.00, the franchise thereby created. For a period of 20 years from February 10, 1927, it authorized the purchaser of the franchise, known as “the company”, to occupy the streets and public places of the town with a natural gas or manufactured or “mixed” gas distribution system. During that time, it gave the purchaser or company the following rights:

“(A) The Company shall have the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation hereinafter provided.

(B) From and after the date when this franchise becomes effective the Company shall charge, demand, collect and receive sixty-five cents per thousand cubic feet for natural gas consumed by its customers in the City of Ravenna, Kentucky.

(C) When a bill for gas service is not paid by a customer within ten days after said bill is mailed or delivered to said customer, the Company may charge, demand, receive and collect a further sum of five cents per thousand cubic feet. The rates, charges, or compensation to be charged, de-

manded, received and collected shall be net and shall not be increased by any meter rental, service charge or other device of any kind or description.

[fol. 49] (D) The Company shall have the right to require from each and every customer of gas before gas service is installed, a deposit of twice the amount of an estimated monthly gas bill which said deposit may be retained by the Company until gas service is discontinued, and all bills paid by the customer, or a bond or other security, as the Company may determine, to guarantee the payment of any such gas bill or bills. The Company shall have the right to discontinue the service to any customer who fails to pay his bills within ten (10) days after said account is due and the bill has been rendered."

The purchaser agreed to furnish certain specified gas service.

EXHIBIT U

Barbourville, Kentucky, Gas Franchise

This is an ordinance adopted by the Board of Council of the city of Barbourville, Kentucky, on August 10, 1921. It created and defined the franchise for distribution of natural gas in the city of Barbourville, Kentucky, for a period of 20 years, beginning August 10, 1921. It authorized the purchaser of such franchise, to be sold at public auction by the Mayor of the town, to occupy the public streets of the town during that period. During the period of the franchise, it provided that:

"Sec. 5. The rate for natural gas under this franchise, shall at no time exceed (75¢) seventy five cents, per thousand cubic feet, and this rate shall be subject to a discount of 10¢ per thousand Cubic Feet, if the bill therefor rendered to the [fol. 50] customer be paid on or before the 10th day of the month following the month in which the gas is consumed, and for which the bill is rendered, provided however that the purchaser of this franchise, may fix exact and collect a minimum charge of \$1.50, One Dollar and Fifty Cents, from any consumer whose aggregate consumption of gas per month does not exceed 2000, Two Thousand Cubic Feet.

"Sec. 6. The rate per thousand feet of gas as herein fixed and the discount to be allowed therefrom as herein fixed, or

any rate and discount that maximum as may be hereafter fixed or determined by the purchaser shall be uniform to all customers."

The purchaser agreed to furnish certain specified gas service.

EXHIBIT V

Corbin, Kentucky, Gas Franchise (1121)

This is an ordinance finally adopted by the Board of Commissioners and Mayor of the city of Corbin, Kentucky, on May 1, 1928. It authorized the Mayor of the city to sell at public auction to the highest and best bidder, but for not less than \$100.00, the franchise thereby created. It authorized the purchaser, therein called the "Grantee", to occupy the public streets and places of the town with a natural or manufactured or "mixed" gas distribution system for a period of 20 years, beginning May 1, 1928. During such time, it provided that:

[fol. 51] "Section (9) The grantee shall have the right to charge, collect and receive for its gas service just and reasonable rates, charges or compensation therefor."

"Section (10) The grantee shall furnish gas to the said City of Corbin and the inhabitants thereof as herein provided at the rate of seventy cents (70¢), per one thousand cubic feet, same to be paid for monthly as bills are furnished, as hereinafter set forth, to the customers, and in case such bill is paid on or before the 10th of the month, succeeding the month in which the gas is consumed, the same shall be discounted at the rate of five cents (5¢) per thousand cubic feet. Said bills are payable at the office of the grantee in Corbin. Said grantee shall furnish gas to industries or factories within the said city at such rate as may be agreed upon from time to time by him and such customers."

The purchaser agreed to furnish certain specified gas service.

EXHIBIT W

Corbin, Kentucky, Gas Franchise (1205)

This was an ordinance adopted by the Board of Commissioners of the city of Corbin, Kentucky, on June 10, 1930.

It directed the Mayor of the city to sell the franchise thereby created and defined at public auction to the highest and best bidder, but for not less than \$1500.00. It authorized the purchaser, therein called the "Grantee", to occupy the streets of the city of Corbin with a natural or manufactured or "mixed" gas distribution system for a period of [fol. 52] 20 years, beginning June 10, 1930. During that time, it provided that:

"Section (10) The grantee shall furnish gas to the said City and the inhabitants thereof as herein provided at the rate of Seventy (70¢) cents for each One Thousand (1,000) cubic feet of the first 5,000 cubic feet of gas consumed in any one month, subject to a discount of five (5¢) cents per thousand cubic feet, on all consumers' bills if paid on or before the 10th of the month following that in which the gas shall have been delivered, & sixty-five (65¢) cents for each 1,000 cubic feet of gas over and above the first 5,000 cubic feet consumed in any one month, subject to a discount of five (5¢) cents per thousand cubic feet, on all consumers' bills if paid on or before the 10th of the month following that in which the gas shall have been delivered. Said bills shall be payable at the office of the grantee in Corbin. Said grantee shall furnish gas to industries or factories within the said city at such a rate as may be agreed upon from time to time by him and such customers."

The purchaser agreed to furnish certain specified gas service.

EXHIBIT X

Corbin, Kentucky, Gas Franchise (1231)

This is an ordinance adopted by the Board of Commissioners of the city of Corbin, Kentucky, on January 20, 1931. It directed the Mayor of the city to sell the gas franchise thereby created and defined at public auction to the highest and best bidder, but for not less than \$2500.00. It authorized the purchaser, therein called the "Grantee", his heirs or assigns, to occupy the streets and public places of the city for a period of 20 years from January 20, 1931, with a natural or manufactured or "mixed" gas distribution system. During that time, it also provided that:

"Section (10). The grantee shall have the right to charge, collect and receive for its gas service just and reasonable rates, charges or compensation therefor.

Section (11) The grantee shall furnish gas to the said City and the inhabitants thereof as herein provided at the rate not in excess of Seventy (70¢) cents for each One Thousand (1,000) cubic feet for the first 5,000 cubic feet of gas consumed in any one month, subject to a discount of five (5¢) cents per thousand cubic feet, on all consumers' bills if paid on or before the 10th of the month following that in which the gas shall have been delivered; and not in excess of sixty-five (65¢) cents for each 1,000 cubic feet of gas over and above the first 5,000 cubic feet consumed in any one month, subject to a discount of five (5¢) cents per thousand cubic feet, on all consumers' bills if paid on or before the 10th of the month following that in which gas shall have been delivered."

The purchaser agreed to furnish certain specified gas service.

[fol. 54]

EXHIBIT Y

Manchester, Kentucky, Gas Franchise

This is an ordinance adopted by the City Council of the town of Manchester, Kentucky, on February 24, 1931. It directed the Mayor of the town to sell the franchise thereby created at public auction to the highest and best bidder, but for not less than \$100.00. It authorized the purchaser, therein called the "Grantee", to occupy the streets and public places of the town for a period of 20 years from February 24, 1931, with a gas distribution system. During that time, it provided that:

"Section 9. The grantee shall have the right to charge, collect and receive for its gas service just and reasonable rate, charges or compensation therefor.

Section 10. The grantee shall furnish to the said city and the inhabitants thereof as herein provided at the rate of not in excess of 60 cents per thousand cubic feet, same to be paid for monthly as bills are furnished, as hereinafter set forth, to the customers, and in case such bill is paid on

or before the 10th of the month, succeeding the month in which the gas is consumed, the same shall be discounted at the rate of 5 cents per thousand cubic feet. Said bills shall be payable at the office of the grantee in Manchester. Said grantee shall furnish gas to industries or factories within the said city at such rate as may be agreed upon from time to time by him and such customers."

[fol. 55] The purchaser agreed to furnish certain specific natural gas service.

EXHIBIT Z

Somerset, Kentucky, Gas Franchise

This is an ordinance adopted by the Mayor and Board of Council of the city of Somerset, Kentucky, on August 8, 1932. It directed the Mayor of the city to sell the franchise thereby created and defined, at public auction, to the highest and best bidder, but for not less than \$300.00. It authorized the purchaser, therein called the "Grantee"; his heirs or assigns, to occupy the city streets and public places with a gas distribution system for a period of 20 years from August 8, 1932. During such time, it provided that:

"The grantee shall furnish gas to the said city and the inhabitants thereof as herein provided at a rate not in excess of seventy (70¢) cents for each 1000 cubic feet of the first two thousand (2000) cubic feet of gas consumed in any one month; and sixty-five (65) cents for each 1000 feet of the next three thousand (3000) cubic feet of gas consumed in any one month; and sixty (60¢) per 1000 cubic feet for all gas consumed in any one month over and above the first five thousand (5000) cubic feet; said above rates being subject to a discount of five (5¢) cents per thousand cubic feet on all customers' bills if paid on or before the 10th of the month following that in which the gas shall have been delivered."

The purchaser agreed to furnish certain specific natural gas service.

[fol. 56]

EXHIBIT AA

London, Kentucky, Gas Franchise

This is an ordinance adopted by the Mayor and Board of Council of the city of London, Kentucky, on September 8, 1928. It directed the Mayor of the city to sell the franchise thereby created and defined at public auction to the highest and best bidder, but for not less than \$100.00. It authorized the purchaser, therein called the "Grantee", his heirs or assigns, to occupy the city streets and public places for a period of 20 years from September 8, 1929, with a natural gas distribution system. During such time, it provided that:

"The grantee shall furnish to the said city and the inhabitants thereof as herein provided at the rate of sixty (60) cents per thousand cubic feet, same to be paid for monthly as bills are furnished, as hereinafter set forth, to the customers, and in case such bill is paid on or before the 10th of the month, succeeding the month in which the gas is consumed, the same shall be discounted at the rate of five (5¢) cents per thousand cubic feet. Said bills shall be payable at the office of the grantee in London. Said grantee shall furnish gas to industries or factories within the said city at such rate as may be agreed upon from time to time by him and such customers."

The purchaser agreed to furnish certain specified natural gas service.

[fol. 57]

EXHIBIT BB

Plea to the Jurisdiction of the Commission

This is a plea filed by the plaintiff, Petroleum Exploration, with the Public Service Commission of Kentucky protesting that the Commission did not have jurisdiction to investigate or regulate its business or to abrogate the prices it received for natural gas. Together with Exhibits CC. and DD. it set up all the material facts stated in the Bill in Equity herein. Also, it prayed of the Commission substantially the same relief prayed in the Bill in Equity.

EXHIBIT CC

Petition for Rehearing

This is plaintiff's petition addressed to the Public Service Commission of Kentucky, asking that it rehear and set aside its order of June 29, 1937, copied in the Bill in Equity.

EXHIBIT DD

Amended and Supplemental Plea to the Jurisdiction

Plaintiff filed this plea with the Commission at the same time it filed its aforesaid petition for rehearing. See Exhibit BB.

ORDER APPROVING CONDENSED STATEMENT OF EXHIBITS—
Entered Jan. 6, 1938

The Court orders that the foregoing condensed statement of exhibits be and it is hereby approved.

Teste:

H. Church Ford, Judge.

The foregoing condensed statement of exhibits is approved.

Hubert Meredith, Atty. Gen.; J. W. Jones, Asst.
Atty. Gen., Attorneys for Defendants.

[fol. 58] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed July 28,
1937

Complainant, Petroleum Exploration, moves the court to grant it a temporary restraining order against the defendants, restraining them, pending further order of the court, from further proceeding against complainant in their investigation, case no. 396.

W. J. Brennan, Allen Prewitt, for Complainant.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—Filed
and Entered July 28, 1937

Upon plaintiff's motion, duly pursuant to notice, the Court orders that the defendants, Public Service Commission of Kentucky, et al. be and they are hereby restrained until a motion herein for a temporary injunction can be heard and determined, from proceeding further against the plaintiff in the defendant's investigation Case No. 396.

The Court has found upon the verified Bill of Complaint that irreparable injury would result to the plaintiff unless such temporary restraining order is granted, in that plaintiff would be required to expend the sum of at least Twenty-five Thousand (\$25,000.00) Dollars to comply with the defendant's orders in their said Case No. 396, dated May 29th and June 30th, 1937, respectively, for which there would be no recovery in the event plaintiff should be adjudged final relief herein.

The Court further finds that this suit requires a proceeding under Judicial Code Section No. 266, and hereby convenes a Court of three judges under said section to hear the plaintiff's motion for preliminary injunction on Saturday, August 7, 1937.

The Court fixed the plaintiff's bond upon this temporary restraining order in the penal sum of One Thousand [fol. 59] (\$1,000.00) Dollars, then came plaintiff as principal with Earl D. Wallace as surety and executed bond as required by law in said sum which the Court now examines and approves.

This July 28, 1937.

H. Church Ford, Judge.

Notice of said application for preliminary injunction on August 7, 1937, is hereby waived by the defendants and by Hubert Meredith as Attorney General of the State of Kentucky.

Hubert Meredith, by J. W. Jones, Assistant Attorney General, for Defendants.

Bond on temporary restraining order for \$1,000.00, approved and filed July 28, 1937, omitted in printing.

[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER FILING ANSWER—Entered August 3, 1937

Came the defendants, by counsel, and offered for filing Answer herein, and the Court being advised, it is ordered that the said Answer be and the same is filed and noted of record.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 3, 1937

The joint and several answer of the defendants, Public Service Commission of Kentucky, J. C. W. Beckham, Thomas B. McGregor and James W. Cammack, Jr., to the Bill of Complaint of the complainant above named respectfully shows:

I

Answering the first paragraph of the bill, defendants admit that the full name of the complainant is "Petroleum Exploration"; admit that the complainant is a corporation organized and existing solely under the laws of the state of Maine, and that its principal office in said state is 443 Congress street, in the city of Portland, in the southern division of the district of Maine; admit that the complainant is duly authorized and qualified to hold property and to do business as a foreign corporation in the state of Kentucky.

Defendants further admit that their full names are: "Public Service Commission of Kentucky", "J. C. W. Beckham", "Thomas B. McGregor" and "James W. Cammack, Jr.", and that said names are commonly used by the defendants, and that the defendants are commonly known by said names.

Defendants further admit that the Public Service Commission of Kentucky is a body corporate created and existing solely by and under the laws of the state of Kentucky, and that its principal office in said state is in the city of Frankfort, in the eastern district of Kentucky.

Defendants further admit that J. C. W. Beckham, Thomas B. McGregor and James W. Cammack, Jr., are members [fol. 61] of the Commission, and are all the members

thereof, and that each of them is a citizen of the state of Kentucky and a resident of said city of Frankfort, in the eastern district of Kentucky, and that the said J. C. W. Beckham is Chairman of the said Commission.

II

Answering the second paragraph of the bill the defendants deny that the matter in controversy herein, exclusive of interest and costs, exceeds the sum of three thousand (\$3,000.00) dollars; admit that this suit is wholly of a civil nature, and that it (a) arises under the Constitution and laws of the United States, and (b) is between citizens of different states.

III

Answering the third paragraph of the bill, defendants state that they have no knowledge, information or belief relative to the complainant being organized in 1916 for the purpose of exploring for petroleum a large area of land known as the "Miller-Prewitt-Goff (Wells Heirs)" tract, containing some 6,000 acres, more or less; situated in Lee, Wolfe, Powell and Estill counties in the state of Kentucky; state that they do not have any knowledge, information or belief relative to such exploration having proved profitable, and that the complainant continued its exploration elsewhere in the state of Kentucky, and in the course thereof discovered valuable deposits of natural gas.

The defendants admit that the complainant is now engaged in the operation of lands in Owsley, Jackson, Clay and Knox counties in the state of Kentucky, for, and the production therefrom of, natural gas; admit that said gas is contained in porous portions, sometimes called "pay-streaks", of a subterranean stratum or geological horizon [fol. 62] called the Corniferous limestone, in isolated and limited areas, sometimes called "fields", and is produced by means of wells sunk thereto from the surface; admit that complainant's rights to so operate said lands for and produce therefrom the said gas are vested in it by virtue of divers grants from the several landowners, commonly called "oil and gas leases", as exemplified by complainant's Exhibit A.

Defendants further admit that part of the said gas produced by the complainant from said fields in said Owsley,

Jackson and Clay counties is sold by it to Central Kentucky Natural Gas Company, a corporation, hereinafter sometimes called "Central", and delivered at the corporate limits of the city of Lexington, in the county of Fayette, in the state of Kentucky, pursuant to a written contract dated the 24th day of March, 1927, entered into between said Central and the complainant, as shown by a copy thereof, and identified as complainant's Exhibit B.

Defendants further admit that part of the said gas produced by the complainant from the said fields last mentioned is sold by it to said Central and delivered at the corporate limits of the city of Richmond, in the county of Madison, in the state of Kentucky, and of the city of Irvine, in the county of Estill, in the state of Kentucky, pursuant to a written contract dated the 7th day of December, 1927, entered into between one D. L. Johnson and the complainant, as shown by a copy thereof which has been identified as complainant's Exhibit C; admit that the rights of said Johnson under said contract, by virtue of mesne assignments, have come to vest in the said Central.

Defendants further admit that in addition to said gas produced by the complainant from said Knox county field it also purchases in said field like gas so produced by others [fol. 63] operating therein; admit that all of the said gas so produced from and purchased in said Knox county field is sold by the complainant to the Peoples Gas Company of Kentucky, a corporation, hereinafter sometimes called "Peoples".

Defendants further admit that a portion of said gas so produced from and purchased in said field and sold to said Peoples is delivered at the corporate limits of the city of Barbourville, in the county of Knox, in the state of Kentucky, pursuant to a written contract dated the 17th day of September, 1930, entered into between the said Peoples and complainant, as shown by a copy thereof identified as complainant's Exhibit D; admit that said contract was modified by another written contract dated December 1, 1932, entered into between the said Peoples and complainant, as shown by a copy thereof identified as Exhibit E; that said modified contract was again modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941, to provide for a price of eighteen (18¢) cents per 1,000 cubic feet of gas distributed for commercial and industrial use.

Defendants admit that the remainder of said gas so produced from and purchased in said Knox county field and so sold to said Peoples is delivered at the corporate limits of the city of Corbin, in the county of Whitley, in the state of Kentucky, pursuant to a written contract dated December 17, 1930, entered into between said Peoples and the complainant, as shown by a copy thereof identified as complainant's Exhibit F; admit that said contract was modified by another written contract dated September 29, 1931, entered into between the said Peoples and complainant, as shown by a copy thereof identified as complainant's Exhibit G; admit that said modified contract was further modified by another written contract dated May 15, 1933, entered into between said Peoples and the complainant, as shown by a copy thereof identified as complainant's Exhibit H; admit that [fol. 64] said contract so modified was again modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941, to provide for a price of eighteen (18¢) cents per 1,000 cubic feet for gas distributed for commercial and industrial use.

Defendants further admit that part of the said gas produced by the complainant from said Clay county field is sold by it to said Peoples, and delivered to the corporate limits of the city of Manchester, in the county of Clay, in the state of Kentucky, pursuant to a written contract dated the 18th day of April, 1931, entered into between said Peoples and the complainant, as shown by a copy thereof identified as complainant's Exhibit I; admit that said contract was modified by another written contract dated December 1, 1932, entered into between the said Peoples and the complainant, as shown by a copy identified as complainant's Exhibit J.

Defendants further admit that a part of said gas produced by the complainant from said Clay county field is sold by it to said Peoples and delivered at the corporate limits of the city of Somerset, in the county of Pulaski, in the state of Kentucky, pursuant to a written contract dated November 1, 1932, entered into between said Peoples and the complainant, as shown by a copy thereof identified as complainant's Exhibit K; admit that said contract was modified from June 1, 1933, to June 1, 1938, and thereafter to June 1, 1941, to provide for a price of twenty-five (25¢) cents per 1,000 cubic feet for gas distributed for commercial and industrial use.

Defendants further admit that a part of said gas so produced by the complainant from said Clay county field is

sold by it to said Peoples and delivered at the corporate limits of the town of Burning Springs, in the county of Clay, [fol. 65] in the state of Kentucky, at a price of twenty-five (25¢) cents per 1,000 cubic feet.

Defendants further admit that a part of said gas produced by the complainant from said Clay county field is sold by it to Edwards & Eversole Gas Company, a co-partnership composed of P. P. Edwards and R. C. Eversole, and delivered at the corporate limits of the city of London, in the county of Laurel, in the state of Kentucky, pursuant to a written contract dated July 3, 1935, entered into between said co-partnership and the complainant, as shown by a copy thereof identified as complainant's Exhibit L.

Defendants further admit that in order to make deliveries as aforesaid of the complainant's said natural gas so sold to said Central, Peoples and Edwards & Eversole Gas Company, the complainant has constructed or purchased and maintains transmission lines as follows:

(1) From said Owsley-Jackson-Clay county fields, to the corporate limits of said city of Lexington, with branch lines to the corporate limits of said cities of Richmond and Irvine.

(2) From said Clay county field to the corporate limits of said city of Somerset, with branch lines to the corporate limits of said cities of Manchester and London and said town of Burning Springs.

(3) From said Knox county field to the corporate limits of said cities of Barbourville and Corbin.

Defendants further admit that said transmission lines are metal pipe buried in the ground and laid through lands pursuant to grants from the landowners, commonly called "rights-of-way", as exemplified by complainant's Exhibits M and N; admit that said transmission lines separately mentioned in items (1), (2) and (3) last above are not interconnected and are independently operated.

[fol. 66] Defendants deny that the complainant does not sell nor offer to sell natural gas to the public; deny that the complainant does not transmit nor offer to transmit natural gas for the public; deny that the complainant does not transmit gas for any other. Defendants admit that all gas passing through complainant's said transmission lines is owned exclusively by the complainant and is produced by the com-

plainant as aforesaid, save for small quantities purchased as aforesaid in said Knox county field.

Defendants admit that the said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Lexington pursuant to the aforesaid contract is distributed by said Central in said city pursuant to a franchise granted by said city to said Central, as shown by a copy thereof identified as complainant's Exhibit O. Defendants admit that said franchise was so granted pursuant to the authority conferred on said city by Section 164 of the Constitution of the State of Kentucky, after due advertisement, said Central having been the highest and best bidder therefor, and its bid therefor having been accepted by said city; admit that said franchise became effective from January 28, 1927, for the term of twenty years next ensuing; deny that said franchise reserved to the parties thereto the right to fix the rates to be charged by said Central for gas distributed in said city pursuant to said franchise, but admit that said franchise attempted or purported to make such a reservation, but aver that said reservation was conditioned upon and made subject to legislation contrary or adverse thereto subsequently enacted by the Kentucky General Assembly. Defendants admit that afterwards on May 7, 1934, the said city pursuant to said purported reserved right, by authority of said Section 164, in reference to said franchise, in its proprietary capacity, entered into a contract with said [fol. 67] Central fixing the rates to be charged by said Central for gas distributed in said city pursuant to said franchise, effective until March 1, 1939, said effective date thereof and the rates fixed therein being subject, however, to subsequent legislation by the General Assembly of Kentucky and modification or regulation by any regulatory body or agency of the Commonwealth of Kentucky created by subsequent legislation. Defendants admit that a true copy of said contract is shown by complainant in Exhibit P; admit that said contract is the same contract which was affirmed by the Court of Appeals of Kentucky in the cases of Central versus said city and others and said Central versus Wright, decided September 27, 1935, and reported in 260 Ky. 361, 85 S. W. (2d) 870, and by the Supreme Court of the United States in the case of Wright and others versus said Central and others, decided March 16, 1936, and reported in 297 U. S. 537, 80 L. Ed. 850; admit that on May 21, 1934, said

city amended said franchise so as to conform with said contract with respect to said rates as shown by a copy of an ordinance identified as complainant's Exhibit Q.

Defendants admit that said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Richmond pursuant to said contract is distributed by said Central in said city pursuant to a franchise granted by said city to said D. L. Johnson and his assigns, as shown by a copy thereof identified as complainant's Exhibit R; admit that said franchise was so granted pursuant to the authority conferred upon said city by said Section 164, after due advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective from April 5, 1938, for the term of twenty years next ensuing, and by mesne assignments has come to vest in said Central; admit that at the same time the said city of [fol. 68] Richmond pursuant to said Section 164, in reference to said franchise, and as a parcel thereof in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rate so fixed therein and the effective period of time thereof were fixed subject to modification and regulation by any regulatory agency created and empowered by the General Assembly of Kentucky by subsequent legislation.

Defendants admit that said gas so sold and delivered to said Central by the complainant at the corporate limits of said city of Irvine pursuant to said contract between the said Central and said city is distributed by said Central in said city, and in the city of Ravenna adjacent thereto, in the said county of Estill. Defendants admit that the said distribution by said Central in said city of Irvine is pursuant to a franchise granted by said city to said D. L. Johnson and his assigns, as shown by a copy thereof identified as complainant's Exhibit S; admit that said franchise was so granted pursuant to the authority conferred on said city by said Section 164, after due advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective on April 13, 1927, for a term of twenty years next ensuing, and by mesne assignments has

come to vest in said Central; admit that at the same time the said city of Irvine pursuant to said Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective [fol. 69] during the term thereof, but aver that the rate so fixed therein and the effective period of time thereof were fixed subject to modification and regulation by any regulatory agency created by the General Assembly of Kentucky by subsequent legislation.

Defendants further admit that said distribution by said Central and said city of Ravenna is pursuant to a franchise granted by said city to said D. L. Johnson and his assigns, as shown by a copy thereof identified as complainant's Exhibit T; admit that said franchise was so granted pursuant to the authority conferred on said city by said Section 164, after due advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective on February 10, 192-, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Central; admit that at the same time the said city of Ravenna pursuant to said Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the effective period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

Defendants further admit that said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Barbourville pursuant to said contract is distributed by said Peoples in said city pursuant to a franchise granted by said city to Barbourville Supply Company, a corporation, and its assigns, as shown by a copy thereof identified as complainant's Exhibit U; admit that said franchise was so granted pursuant to the authority conferred on said city by said Section 164, after due

advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective on August 9, 1921, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; admit that at the same time the said city of Barbourville pursuant to Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed in said contract, and the effective period of time thereof, were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

Defendants further admit that said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Corbin pursuant to said contract is distributed by said Peoples in said city pursuant to franchises granted by said city as follows:

(1) To C. R. Luker and his assigns, as shown by a copy thereof identified as complainant's Exhibit V, and that said franchise was so granted pursuant to the authority conferred on said city by Section 164, after due advertisement, said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city and that the said franchise became effective on May 1, 1928, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; that at the same time the said city of Corbin pursuant to said Section [fol. 71] 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

(2) To the complainant and its assigns, as shown by a copy thereof identified as complainant's Exhibit W, and that said franchise was so granted pursuant to the authority

conferred on said city by said Section 164, after due advertisement, the complainant having been the highest and best bidder therefor and its bid therefor having been accepted by said city, and that said franchise became effective on June 10, 1930, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; that at the same time the said city of Corbin pursuant to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the complainant fixing the rates to be charged by said complainant and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered [fol. 72] by subsequent legislation.

(3) To the complainant and its assigns, as shown by a copy thereof identified as complainant's Exhibit X, and that said franchise was so granted pursuant to the authority conferred on said city by said Section 164, after due advertisement, the complainant having been the highest and best bidder therefor and its bid therefor having been accepted by said city, and that said franchise became effective on January 20, 1931, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; that at the same time the said city of Corbin pursuant to said Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the complainant fixing the rates to be charged by said complainant and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

The defendants admit that said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Manchester pursuant to said contract is distributed by said Peoples in said city pursuant to a franchise granted by said city to the complainant and its assigns, as shown by a copy thereof identified as complainant's Exhibit Y; admit that said franchise was so granted pursuant

to the authority conferred on said city by said Section 164, after due advertisement, the complainant having been the highest and best bidder therefor and its bid therefor having [fol. 73] been accepted by said city; admit that said franchise became effective on February 24, 1931, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; admit that at the same time the said city of Manchester pursuant to said Section 164, in reference to said franchise; and as a parcel thereof, in its proprietary capacity, entered into a contract with the complainant fixing the rates to be charged by it and its assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rate so fixed and the period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

Defendants further admit that the gas so sold and delivered to said Peoples by the complainant at the corporate limits of said city of Somerset pursuant to said contract is distributed by said Peoples in said city pursuant to a franchise granted by said city to W. H. Young and his assigns, as shown by a copy thereof identified as complainant's Exhibit Z; admit that said franchise was so granted pursuant to the said authority conferred by said Section 164, after due advertisement, the said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective on the 8th day of August, 1932, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Peoples; admit that at the same time the said city of Somerset pursuant to said Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the said grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the period of time thereof [fol. 74] were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

Defendants admit that the gas so sold and delivered to said Edwards & Eversole Gas Company by the complainant at the corporate limits of said city of London pursuant to

said contract is distributed by said Edwards & Eversole Gas Company in said city pursuant to a franchise granted by said city to C. R. Luker and his assigns, as shown by a copy thereof identified as complainant's Exhibit AA; admit that said franchise was so granted pursuant to the authority conferred on said city by said Section 164, after due advertisement, the said grantee having been the highest and best bidder therefor and his bid therefor having been accepted by said city; admit that said franchise became effective on September 8, 1929, for a term of twenty years next ensuing, and by mesne assignments has come to vest in said Edwards & Eversole Gas Company; admit that at the same time the said city of London pursuant to said Section 164, in reference to said franchise, and as a parcel thereof, in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by said grantee and his assigns for gas distributed in said city pursuant to said franchise, effective during the term thereof, but aver that the rates so fixed and the period of time thereof were fixed subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation.

Defendants further admit that the said gas so sold and delivered to said Peoples by the complainant at the corporate limits of said town of Burning Springs is distributed by said Peoples in said town without any formal franchise therefor.

The defendants admit that said Peoples has outstanding [fol. 75] 1,280 shares of its common capital stock of the par value of \$25.00 each, of which the complainant is the owner of 1,000 shares; admit that the remaining 280 shares of said outstanding stock are owned as follows:

Stockholder	Address	Shares
John T. Bishop, Jr.	Basin, Wyoming	20
Marion C. Bishop	"	20
Helen Goodwin	Care Mrs. E. A. Durham, Sistersville, W. Va.	15
Mary V. Fisk	"	15
Elizabeth Brand	"	15
Ada B. Durham	"	50
Marjorie D. McLain	Garden City, N. Y.	20
E. Arthur Durham, Tr.	Sistersville, W. Va.	25
Edwin A. Durham, Inc.	"	100

Defendants state that they do not have any knowledge, information or belief as to whether or not said Peoples is indebted to the complainant in the sum of \$200,000.00 or in any sum.

Defendants state that they do not have any knowledge, information or belief as to whether or not any affiliation, domination or control whatsoever, direct or indirect, intermediate or remote, exists or has ever existed between the complainant and (1) said Central or (2) said D. L. Johnson, or any of his assigns, or (3) said Edwards & Eversole Gas Company or either of said members thereof; they state that they do not have any knowledge, information or belief as to whether or not each of the said contracts between the complainant and (1) said Central, (2) said D. L. Johnson, and (3) said Edwards & Eversole Gas Company, was negotiated and entered into between strangers at arm's length.

The defendants admit that the General Assembly of the [fol. 76] Commonwealth of Kentucky passed an act (1934, c. 145; as amended 1936, c. 92—Ky. Stat. 3952-1 to 3952-61, inclusive) originally effective on the 14th day of June, 1934, establishing the said Commission, and giving it regulatory authority in the public interest over certain "utilities" therein defined, inter alia, as follows:

"* * * corporations * * * that now or may hereafter own, control, operate or manage * * * (two) any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of the same, for light, heat, power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *"

Defendants further admit that said act further provides (Ky. Stat. 3952-27):

"The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and promulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise,

between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules or service standards shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed; nor any contract or agreement effecting same shall be abrogated or changed until and after a hearing has been had before the commission in the manner prescribed in this act.

“Nothing in this section or elsewhere in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.”

Defendants deny that said provision of said act last above [fol. 77] quoted insofar as it seeks to limit the power of a municipality to contract, in its proprietary capacity, with a utility, in reference to a franchise granted to such utility, with respect to rates, is contrary to Sections 163 and 164 of the Constitution of Kentucky, vesting in cities and towns exclusive authority to grant franchises for the use of their streets, alleys and other public grounds for the distribution of gas and other commodities, and to contract in a proprietary capacity with the grantee, in reference to any such franchise, with respect to rates, but aver that said provision of said act is constitutional and entirely valid.

Defendants further deny that said provision of said contract last above quoted insofar as it undertakes to vest in said Commission regulatory jurisdiction of the rates to be charged by said Central in said city of Lexington, said City of Richmond, said City of Irvine, and said city of Ravenna, and by said Peoples in said city of Barbourville, said city of Corbin, said city of Manchester, said city of Somerset, and by said Edwards & Eversole Gas Company in said city of London, impairs the obligation of the several rate contracts entered into respectively between said cities and said distributors, in reference to their respective franchises, as shown by complainant's exhibits, in contravention of the contract clause (Article 1, Section 10, Clause 1) of the Constitution of the United States, and the contract clause (Section 19) of the Constitution of Kentucky, but aver that said provision of said contract is consistent

and in conformity with said contract clause of the Constitution of the United States and of the said contract clause of the Constitution of Kentucky.

Defendants admit that, on the — day of —, 1937, the said Commission served on the complainant by registered mail a copy of an order whereof the following is a true copy:

[fol. 78] "BEFORE THE PUBLIC SERVICE COMMISSION OF
KENTUCKY

"A meeting of the Public-Service Commission was this day held; present: Commissioners Cammack and McGregor.

• • • • •

Case No. 396

In the Matter of Investigation on Motion of the Commission of the Rates, Rules and Practices of the Petroleum Exploration, Inc.

"Notice of Investigation and Order to Show Cause

"Whereas, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"Whereas, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"Whereas, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"Whereas, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine-Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"Whereas, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"Now, Therefore, Notice is Hereby Given, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"Whereas, Under such circumstances the Commission find the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"Now, Therefore, it is Ordered:

[fol. 79] "1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

"2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

"3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed classification of such charges showing separately each class of service and the charges therefor and amounts cleared to each account.

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

Notice is Hereby Given to the Petroleum Exploration, Inc., of the above order of the Commission.

Dated at Frankfort, Kentucky, this 29th day of May, 1937.

(S.) Chas. J. White, Secretary. (Seal.)"

Defendants state that they do not have any knowledge, information or belief as to whether or not there is now or ever has existed any contract, agreement or working arrangement as mentioned in paragraph "2" of the above quoted order, and that they do not have any knowledge, in-[fol. 80] formation or belief as to any charge, payment or obligation as mentioned in paragraph "3" thereof.

Defendants admit that on the 29th day of June, 1937, complainant by its agents and attorneys appeared before the said Commission and tendered a plea to its jurisdiction, as shown by a copy thereof identified as complainant's Exhibit BB, and that nothing in the way of traverse or avoidance was filed or testified to in opposition to said plea, and that an order entered on or as of June 29, 1937, said plea was overruled and that thereafter a copy of said order last mentioned was served by said Commission on the complainant by registered mail on July 3, 1937, whereof the following is a true copy:

"BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

"A meeting of the Public Service Commission was held on this date; present: Chairman Beckham, Commissioners Cammack and McGregor.

• • • • •

Case No. 396

In the Matter of Investigation on Motion of the Commission of the Rates, Rules and Practices of the Petroleum Exploration, Inc.

"Order

"This cause coming on to be heard on the plea of the Petroleum Exploration, Inc., to the jurisdiction of the Com-

mission and it appearing to the Commission that the Petroleum Exploration, Inc., is engaged in the business of producing, selling and delivering natural gas to various utility companies, which sell and distribute the same to the public in Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown, all of which towns and all communities are in Kentucky; and it further appearing that the Petroleum Exploration, Inc., owns, controls, operates, and manages facilities used in connection with the production, storage, distribution, sale, and furnishing to and for the public for compensation natural gas for light, heat, power, and other purposes and owns and controls facilities used in connection with the transporting and conveying of gas by pipe line to and for the public for compensation; and it further appearing that the Petroleum Exploration, Inc., is a 'utility' under sections 3952-1-12-13-14 of the Kentucky Statutes; and the Commission being advised,

[fol. 81] "It is Ordered, That the plea to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that the demurrer to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that this action be and hereby it is set down for formal hearing on Thursday, July 29, 1937, at 10:00 A. M., on the notice of investigation and order to show cause issued by the Commission herein on May 29, 1937, to all of which the Petroleum Exploration, Inc., objects and excepts.

"This the 29th day of June, 1937.

"Public Service Commission of Kentucky, (S.) J. C. W. Beckham, Chairman. (S.) James W. Cammack, Jr., Commissioner. (S.) Thos. B. McGregor, Commissioner. (Seal.)

Attest: (S.) Chas. J. White, Secretary."

Defendants admit that thereafter on July 20, 1937, pursuant to the provisions of said act (Ky. Stat. 3952-36) the complainant again appeared before said Commission, by its attorney, and filed its application for a rehearing, together with an amended and supplemental plea to the juris-

diction of said Commission, as shown by copies thereof identified as complainant's Exhibits CC and DD.

Defendants admit that the said Commission has not yet ruled upon said application and amended and supplemental plea, and further admit that the Commission intended and threatened to proceed with said investigation, case number 396, on July 29, 1937, and thereafter, and would have so proceeded except for a temporary restraining order issued herein by the judge of this court, but denies that said proceeding would have been unlawful, unreasonable and useless, but aver that said proceeding would have been lawful, reasonable, useful and needful.

[fol. 82] Defendants deny that it is the obvious purpose of the said Commission to attempt to lower some or all of the prices at which the complainant pursuant to the aforesaid contracts sells and delivers gas to said Central, said Peoples and said Edwards & Eversole Gas Company, respectively, but aver that the purpose of the said Commission in instituting and conducting said investigation and proceeding was to determine a fair and reasonable price or rate to be charged by the complainant pursuant to the aforesaid contracts, and to fix said price or rate.

The defendants deny that the said Commission is without power to reduce the said prices for said gas so sold and delivered to said Central for distribution in the said cities of Lexington, Richmond, Irvine and Ravenna, and to the said Edwards & Eversole Gas Company for distribution in said city of London, and to said Peoples for distribution in said cities of Barbourville, Corbin, Manchester and Somerset, but aver that the said Commission does have power to reduce the said prices for said gas if said prices are excessive and unfair and unreasonable to said Central, said Edwards & Eversole Gas Company and said Peoples, and to the consuming public served by said Central, said Edwards & Eversole Gas Company, and said Peoples; deny that the distribution rates which are fixed by said contracts are not subject to the regulatory jurisdiction of the said Commission, but aver that said rates are subject to the regulatory jurisdiction of said Commission; deny that any reduction of any of the said prices so charged by the complainant to the said respective distributors for said gas so sold and delivered would not be in the public interest, or for the public benefit, but solely for the private interest and benefit of said respective distributors or some of them,

thereby (1) depriving the complainant of its property without due process of law and denying to it the equal protection [fol. 83] of the laws contrary to the Fourteenth Amendment (Section 1) of the Constitution of the United States, and (2) impairing the obligation of its several contracts, above mentioned, for the sale and delivery of said gas to said respective distributors contrary to the said contract clauses of the Constitution of the United States and Kentucky, but aver that any reduction of any of the said prices so charged by the complainant to the respective distributors for said gas so sold and delivered would be in the public interest and would accrue to the consuming public through other and subsequent regulatory action by the said Commission, and further aver that any reduction of any of the said prices so charged by the complainant to the respective distributors for said gas so sold and delivered, if it should be determined that a reduced price would be fair and reasonable to the complainant, would be consistent and in conformity with the said clauses of the Constitution of the United States and Kentucky.

The defendants further deny that independently of said respective contracts for gas in said cities of Lexington, Richmond, Irvine and Ravenna, of said Central, and in said city of London, of said Edwards & Eversole Gas Company, the respective contracts between the complainant and each of said distributors for the sale and delivery of gas for such distribution are not subject to the regulatory jurisdiction of said Commission, and deny that any reduction of any of the prices fixed by said last mentioned contracts would deprive the complainant of its property without due process of law or would deny the complainant the equal protection of the laws or would impair the obligation of the complainant's contracts contrary to the constitutional limitations aforesaid, but aver that said contracts fixing distribution rates for gas as aforesaid are subject to the [fol. 84] regulatory jurisdiction of said Commission, and further aver that any reduction of any of the prices fixed by said contracts, if it should be determined by the Commission that a reduction thereof would be fair and reasonable to the complainant, would not deprive the complainant of its property without due process of law or deny it the equal protection of the laws, or impair the obligation of its said contracts.

Defendants further deny that independently of said respective contracts fixing the distribution rates for gas in said cities of Barbourville, Corbin, Manchester and Somerset, of said Peoples, the said respective contracts between the complainant and said distributors for the sale and delivery of gas for such distribution are not subject to the direct regulatory jurisdiction of said Commission, but aver that said contracts and the prices for said gas as fixed therein are subject to the direct regulatory jurisdiction of said Commission.

Defendants admit that the complainant delivers gas at the corporate limits of said cities of Corbin, Somerset, Barbourville, Manchester, Richmond, Irvine and Lexington, and of the said town of Burning Springs, at wholesale for distribution therein by the respective local utilities above named, but deny that the complainant does not deliver gas at or for distribution in said towns and communities of Winchester, Mt. Sterling, Cynthiana, Georgetown, Paris, Frankfort, Midway and North Middletown, as set forth in said Commission's orders herein before quoted, and aver that the complainant does deliver gas for distribution in said towns and communities.

The defendants state that they do not have any knowledge, information or belief that complainant's remaining investment in its said natural gas production and transmission properties amounts to \$1,500,000.00, in round numbers, [fol. 85] or that the actual value of said property exceeds said sum.

Defendants deny that the cost and expense to the complainant to "show conclusively the fairness and reasonableness of its present rates and charges for gas" as required by said order of May 29, 1937, hereinbefore quoted, giving "due consideration to (its) * * * history and development * * * and its property, original cost, cost of reproductions as a going concern, and other elements of value recognized by the law of the land for rate making purposes" as required by said act (Ky. Stat. 3952-19), would be the sum of \$25,000.00, in round numbers.

The defendants deny that the said investigation, case number 296, and the said orders entered therein, that is, of the 29th day of May and June, respectively, 1937, above quoted, are unlawful, unreasonable and arbitrary, but aver that they are lawful and reasonable; deny that if said in-

vestigation and orders are further prosecuted, the complainant will be put to unlawful and needless expense in a great sum, to-wit, the said sum of \$25,000.00 for the recovery of which the complainant will have no adequate remedy, and its loss thereby occasioned will be irreparable; deny that the pretended findings in said orders are arbitrary, but aver that said alleged findings are not findings, but are merely statements made by the Commission based on general information of the members of said Commission.

IV

Answering the fourth paragraph of the bill, the defendants admit that the said Central Kentucky Natural Gas Company, is a corporation, organized and existing solely under the laws of the state of Kentucky, with an office at said city of Lexington, in the eastern district of Kentucky; admit that said Peoples Gas Company of Kentucky is a corporation organized and existing solely under the laws of [fol. 86] Delaware, duly authorized and qualified to hold property and do business as a foreign corporation in the state of Kentucky, with an office in said city of Lexington, in the eastern district of Kentucky; admit that each of said P. P. Edwards and R. C. Eversole, composing said partnership of Edwards and Eversole Gas Company, is a citizen of the state of Kentucky and a resident of the eastern district of Kentucky.

V

The defendants for further answer to complainant's bill state and allege that the complainant is the parent corporation of the Peoples Gas Company of Kentucky, referred to in complainant's bill and hereinbefore and hereinafter referred to as "peoples", and that said Peoples is a subsidiary of the complainant, and is controlled by the complainant, and the defendants further allege that the contracts mentioned in complainant's bill as having been entered into and existing between the complainant and said Peoples were made and entered into by the complainant and said Peoples at a time when the complainant was the parent corporation of said Peoples and said Peoples was a subsidiary of the complainant and under the control of the complainant, and that said contracts were not made and entered into at arm's length by said parties thereto.

VI

Wherefore, the defendants, having answered the bill of the complainant, pray that the complainant's bill be dismissed, and further pray for any and all other proper relief.

Hubert Meredith, Attorney General; J. W. Jones, Assistant Attorney General, Attorneys for Defendants.

[fol. 87] *Duly sworn to by James W. Cammack, Jr. - Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY INJUNCTION—Filed August 7, 1937

Comes the plaintiff, Petroleum Exploration, and moves the Court for a temporary injunction, and on final hearing for a permanent injunction, in accordance with the prayer of its bill of complaint herein.

W. J. Brennan, Allen Prewitt, For Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Filed and Entered August 7, 1937

This cause coming on for hearing before the Honorable Xen Hicks, Judge of the Circuit Court of Appeals of the Sixth Circuit, Honorable Elwood Hamilton, Judge of the Western District, and Honorable H. Church Ford, Judge of the Eastern District of Kentucky, sitting as a court assembled under 266 of the Federal Code, thereupon came the [fol. 88] plaintiff, Petroleum Exploration, and filed its motion for an interlocutory injunction, and on final hearing a permanent injunction in accordance with the prayer of its bill of complaint; also filed waiver of notice of this hearing by the Honorable Albert B. Chandler, as Governor of Kentucky. Thereupon, all parties having announced ready, the Court heard the testimony of the witnesses offered by the plaintiff to maintain the issue on its part, and cross examination thereof by the defendants, all reported by the Official Court Reporter as prescribed by law and the Rules of this Court. The defendants offered no testimony

in chief on their part. Whereupon, by agreement of the parties, the above styled cause is finally submitted upon the entire record made herein and upon the merits for the final decision of the Court.

It is ordered that plaintiff shall have twenty (20) days from this date within which to file its brief, defendants ten (10) days thereafter in which to file their answering brief, and the plaintiff five (5) days thereafter in which to reply, all briefs to be filed in triplicate and copies thereof furnished opposing counsel at the time of filing.

By agreement of the parties, the temporary restraining order heretofore made in this cause is continued in effect until further order and final decision of this cause upon its merits.

It is further ordered that the said Official Reporter do file with the Clerk, as soon as may be, in triplicate a transcript of the testimony adduced at the said hearing, which shall thereupon become and is made a part of the record in this suit.

H. Church Ford, Judge.

This order should be entered:

[fol. 89] Allen Prewitt, W. J. Brennan, Attorneys for Plaintiff. Hubert Meredith, Atty. Gen.; J. W. Jones, Asst. Atty. Gen., Attorneys for Defendants.

August 7, 1937.

IN UNITED STATES DISTRICT COURT

Condensed Statement of Evidence—Filed January 6, 1938

Introduced before Honorable Zen Hicks, Judge of the Circuit Court of Appeals of the United States for the Sixth Circuit, presiding, and Honorable H. Church Ford, Judge of the United States District Court for the Eastern District of Kentucky, and Honorable Elwood Hamilton, Judge of the United States District Court for the Western District of Kentucky, at Lexington, Kentucky.

Be it remembered that upon the hearing in this cause upon the motion of the plaintiff, Petroleum Exploration, for a preliminary injunction at the place and on the day and date above mentioned before said Judges assembled as a court under Section 266 of the Judicial Code of the United

States, trial thereof was had and upon said trial the following evidences were taken and had on said motion, by agreement of the parties to be also read on the merits, to-wit:

Plaintiff to maintain the issue on its part introduced the following witnesses, who testified as follows:

LLOYD E. GREGG

I have been Secretary of Petroleum Exploration since 1929 and prior to that time had been its Assistant Secretary from about 1920. I am the custodian of its stock books, which I have here with me. (Here the stock books were [fol. 90] offered for the inspection of the Court and Counsel for the defense.) They show that the Central-Kentucky Natural Gas Company has never been a stockholder in the Petroleum Exploration; that the East Kentucky Gas Company has never been a stockholder in the Petroleum Exploration; that D. L. Johnson has never been a stockholder in the Petroleum Exploration; that Edwards and Eversole have never been stockholders in the Petroleum Exploration.

The Petroleum Exploration entered into a contract with the Central Kentucky Natural Gas Company to furnish it certain given quantities of gas at wholesale at the corporate limits of Lexington. It also entered into a contract with one D. L. Johnson to furnish him certain gas at the corporate limits of Richmond and also at Irvine, for distribution, in the first instance, at Richmond, and in the second instance, in Irvine and Ravenna adjacent thereto. Mr. Johnson assigned his contract to the East Kentucky Gas Company, which in turn assigned its contract to the Central Kentucky Natural Gas Company; so that now the Central Kentucky Natural Gas Company is the distributor in Richmond, Irvine and Ravenna.

None of the stockholders of the East Kentucky Gas Company or the Central Kentucky Natural Gas Company or Mr. Johnson, has ever been a stockholder in Petroleum Exploration.

I have here quarterly lists of our stockholders from September 15, 1926, to and including June 15, 1937, which I likewise offer for inspection.

D. L. Johnson entered into the contract with plaintiff set out in full in the bill of complaint in this case for the sale of gas and delivery at the corporate limits of Richmond, Kentucky, and at the corporate limits of Irvine, Kentucky. He

assigned that contract to the East Kentucky Gas Company, which in turn assigned it to the Central Kentucky Natural Gas Company.

[fol. 91] No connection or affiliation or control, immediate or remote, has ever existed between plaintiff and the East Kentucky Gas Company. Likewise, no affiliation, either direct or indirect, has ever existed between plaintiff and the Central Kentucky Natural Gas Company. The policies of plaintiff have never been controlled, either directly or remotely, by the Central Kentucky Natural Gas Company. Plaintiff has never in any manner, either immediately or remotely, controlled the policies of the Central Kentucky Natural Gas Company.

I am familiar with the contract set out in the bill of complaint between plaintiff and Edwards & Eversole, a co-partnership, for delivery of gas to the latter at the corporate limits of the town of London, Kentucky. Plaintiff is not in anywise interested in that partnership. Neither that partnership nor any of its members has ever been a stockholder in the plaintiff company. The co-partnership of Edwards & Eversole has never exercised any control, immediate or remote, of the policies of the plaintiff, Petroleum Exploration.

Plaintiff has never owned any stock in or exercised any control of either the Central Kentucky Natural Gas Company or the East Kentucky Gas Company.

I now submit a list of the directors and officers of Petroleum Exploration from 1926 to this date.

Cross-examination:

There has never been any duplication of officers between the Petroleum Exploration and the Central Kentucky Natural Gas Company or the East Kentucky Gas Company. The contract between Petroleum Exploration and the Central Kentucky Natural Gas Company filed as an exhibit with the plaintiff's bill of complaint is the entire contract between those parties.

[fol. 92] Redirect examination:

The contract between Petroleum Exploration and the Central Kentucky Natural Gas Company for the delivery of gas at the corporate limits of Lexington, Kentucky, was entered into at arm's length. Likewise, the contract between Petroleum Exploration and D. L. Johnson for the delivery

of gas at the corporate limits of Richmond and also at the corporate limits of Irvine, successively assigned to the East Kentucky Gas Company and to the Central Kentucky Natural Gas Company, was entered into at arm's length. Likewise was the contract between Petroleum Exploration and Edwards and Eversole for delivery of gas at London.

Recross-examination:

Plaintiff has owned and controlled a majority of the stock of the Peoples Gas Company of Kentucky since the organization of the latter company in 1930. The latter company distributes gas at Barbourville, Corbin, Somerset and Manchester, where it holds public franchises.

JOHN WISEMAN

I am a Certified Public Accountant and Tax Consultant in the States of Ohio and West Virginia, maintaining my offices at Wheeling. I am Tax and Accounting Consultant for Petroleum Exploration and am familiar with its books, papers and accounts. I am familiar with the system of accounting prescribed for the gas companies of Kentucky by the Public Service Commission of Kentucky. I am familiar with the system of accounting under the Federal Statutes for income tax purposes.

Plaintiff's books have been kept under a system permissible under the Federal Income Tax Statutes and not in accordance with the system prescribed for gas utilities by the Kentucky Public Service Commission. There is a difference between the two systems. If the Commission would agree to certain adjustments apparently necessary, it would cost not exceeding \$1500.00 to conform the books of the company to the system prescribed by the Kentucky Public Service Commission.

Defendants' objection to this last statement overruled and defendants except.

If the Commission did not agree to these adjustments, it would cost plaintiff a great deal in excess of \$5000.00 to set its books up with respect to its gas business according to the requirements of the Kentucky Public Service Commission, from original sources of the company's account-

ing information. The fundamental difference between the two systems is in the treatment of capital items and expense items. In the system prescribed by the Kentucky Public Service Commission there are many items that are treated as capital and should be treated as capital, that are deducted under the Federal Income Tax laws. You have an option under the Federal Income Tax laws to deduct certain items such as drilling items, development of gas properties, etc., during the development period. Under the Federal Income Tax system you have an option of deducting the cost of drilling a well from the gross income. You must capitalize it under the Kentucky Public Service Commission's system. It would not be necessary to go back into the vouchers, if taken from the general books of record; but if it would be necessary to prove each voucher, that would necessitate a considerable amount of detail and going back into the payrolls.

There are other differences. Certain costs of taxes and expenses during the development of the gas field are permissible deductions under the Federal Income Tax laws, [fol. 94] whereas during the development of a gas field under the system prescribed by the Kentucky Public Service Commission and during the construction of gas lines, it would be necessary to capitalize those items. Further, under the system prescribed by the Kentucky Public Service Commission it is permissible to capitalize interest charges on money put into the gas field and the pipe lines during the so-called development or construction period, whereas under the Federal Income Tax laws all interest is deductible.

From my survey of the books and records of accounting of Petroleum Exploration, it has a net remaining investment of approximately \$1,550,000, as of January 1, 1937, after deducting amortization, including what are sometimes called depletion and depreciation, according to proper accounting methods.

Cross-examination:

So far as I know, Petroleum Exploration has not been in the process of developing new territory for gas since 1932. The items about which I have testified relate to the development of its particular gas properties in the State of Kentucky. To conform our accounting system to that required

by the Public Service Commission, it would be necessary to go back and restore items that were charged off under the Income Tax procedure that were allowed as tax deductions under the Federal Income Tax laws. The property ledgers, general ledger and list records do not now show development expenses by items. They show them by total of cost of wells and equipment. If the Commission would be willing to accept those totals, then it would cost approximately \$1500.00 to make the necessary changes to conform the books to the Commission's prescribed system of accounting.

[fol. 95]

JAMES A. YUNKER

I am a Gas Engineer residing at Louisville, Kentucky. I have been engaged in the production and appraisalment of natural gas properties for the last twenty years. I have had experience in the cost of appraising property used in gas production through making appraisals of small companies and also working with the companies with which I was affiliated in connection with appraisals being made of their properties by other appraisalment firms.

I am familiar, at least in a general way, with the gas fields and transmission lines of Petroleum Exploration in the State of Kentucky. From the time they began to develop gas in Kentucky, it was a matter of interest to the companies that I was associated with to keep track of their development as a means of ascertaining future supplies of gas available in Kentucky; and beginning with their first development we followed it very closely, until the last few years, during which time we have kept a certain contact with it, so that I believe I can say that I am generally familiar with their property.

To employ a firm of reputable and competent appraisal engineers to value its properties used in the production and transmission of gas to show conclusively the fairness and reasonableness of its present rates and charges for gas, giving due consideration to its history and development and to its property original cost, and cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate-making purposes, and to accumulate all the engineering information necessary for these purposes, I should estimate it would cost plaintiff not

less than fifteen thousand (\$15,000.00) dollars. This would be the minimum fee of a reputable and competent engineer-[fol. 96] ing firm in my opinion. In addition to that, the company would be put to a considerable expense, because whenever the engineers for the appraisal firms were working, there would have to be engineers of the Company working right alongside of them, for instance, to show them locations, to check with them on conditions of pipe, to give them details to show them where the records were, to talk with them about specific and special constructions, the character of the soil; and generally the cost to the company for its engineering service will run an appreciable percentage of the cost of the appraisal by the outside engineers. Petroleum Exploration would be required to give the appraisal engineers assistance in making their appraisal, which in my opinion would cost it \$5000.00 in addition. The records of the company do not contain this information.

The principal difference is to present an appraisal of a property in a Commission case which would stand up before a Court; it has to be a complete and absolutely detailed inventory of everything that the Company has and everything that it had to do in the way of construction which does not actually show, intangible construction that had to be added in, and also all of the costs relative to the interest on development during construction, and a thousand and one items that make the thing an entirely different job.

You would be obliged to commence as though there were no books kept at all. The engineers would have to see and examine and gather detail price data, figure construction costs and all sorts of intangible costs and also the going concern value; they would have to figure obsolescence, the per cent. condition of the property, the probable life, and how much gas could probably be sold in the future, and where the probable sales would be, and a thousand and one things that would not enter into it for tax purposes of the [fol. 97] bookkeeping of a company such as Petroleum Exploration.

Cross-examination:

I am not and have never been in the service of Petroleum Exploration. I know a number of its personnel. I have on two or three occasions worked with the Petroleum Exploration on income tax appraisals of very small operations of

their properties with a view of determining the value of leases and cost of them; and because at one time a company with which I was associated sent me to Sistersville to make a survey of their property with the expectation of a purchase, I am familiar to the extent of knowing that their records are not voluminous enough to permit any firm of appraisal engineers to make an inventory without starting from the ground up. The purpose of my examination of their records was not to determine that particular point. They have shown me the appraisal records that they have, and they are not such records as I would desire to present in a rate-making case.

I am an Engineer and have done appraisals and worked with companies with which I was associated in making appraisals. I last made an appraisal of a small company in Indiana for the Ohio Oil Company about two years ago. I have made approximately a half dozen appraisals of gas properties in the last five years, all small ones however. I have made appraisals of gas properties in Kentucky. I made one working with some engineers for the United Fuel in 1929, of a big property in Eastern Kentucky, several million dollar property, and I have also made three or four small ones with the smaller companies that desired to have a price system.

[fol. 98] The defendants offered no testimony.

ORDER APPROVING CONDENSED STATEMENT OF EVIDENCE—
Entered January 6, 1938

The foregoing condensed statement of evidence is hereby approved and filed, by said Court as containing a full statement of all the evidence heard in this cause, and is made part of the record for use on appeal of this case to the Supreme Court of the United States this 6th day of January, 1938.

Teste:

H. Church Ford, United States District Judge.

The defendants approve said statement of evidence.

By Hubert Meredith, Attorney General of Kentucky;
J. W. Jones, Assistant Attorney General.

[fol. 99] IN UNITED STATES DISTRICT COURT

Before Hicks, Circuit Judge, and Hamilton and Ford, District Judges

OPINION—Filed November 6, 1937

FORD, District Judge:

This is an action in equity filed by Petroleum Exploration, a corporation doing business in Kentucky but organized and existing under the laws of the State of Maine, to enjoin the Public Service Commission of Kentucky from enforcing or attempting to enforce compliance with an order of the Commission, pursuant to which the Commission proposes to inaugurate an investigation of the rates charged by complainant for gas transported by its pipe lines from its gas fields in Eastern Kentucky to the corporate limits of various Kentucky municipalities and there sold and delivered to certain public utility corporations.

The order complained of required the complainant to produce, at a public hearing before the Commission, evidence showing conclusively the fairness and reasonableness of its rates and charges, a complete statement of all contracts and working arrangements with its subsidiary corporations, if any, and to make available for examination by the Commission's representatives, all its books, accounts, records, correspondence and memoranda.

At the time fixed for the hearing, the complainant appeared and offered a plea challenging the Commission's jurisdiction. The Commission overruled the plea and made an order fixing a later date for the proposed hearing and investigation. Before that time arrived, the complainant filed with the Commission an application for a rehearing on the jurisdictional question, together with an amended and supplemental plea which, on account of the institution of this action, has not been acted upon.

In addition to alleging diversity of citizenship and the [fol. 100] value of the matter in controversy, required to sustain federal jurisdiction under section 24 of the Judicial Code (28 U. S. C. A. § 1), the bill further alleges, in substance, that the complainant, in transporting and selling its gas under contract to certain public utility corporations, is engaged merely in an ordinary private commercial enterprise, that it is not a public utility and is not subject and

can not be made subject to the regulatory jurisdiction of the Commission by any law which would be valid under the State or Federal Constitution. It charges that the obvious purpose of the Commission is to attempt, without right or authority of law, to lower some or all of the rates fixed under its existing contracts, and that the order, made with that end in view, is repugnant to the contract clause of the Federal Constitution and is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The case is submitted upon complainant's motion for a temporary injunction to restrain enforcement of the order of the Commission. Permanent injunction is the ultimate relief sought.

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction." *Cruickshank v. Bidwell*, 176 U. S. 73, 80.

In *State Corporation Commission of Kansas, et al. v. Wichita Gas Company*, 290 U. S. 561, it was asserted that a certain order of the State Corporation Commission of Kansas, made as a preliminary step toward ascertaining and fixing reasonable rates to be charged by a public utility, was repugnant to the Federal Constitution, and temporary and permanent injunction was sought. The court, in denying injunctive relief, said:

[fol. 101] "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted."

It is further alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission would be approximately \$25,000 and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this action.

The Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1934 Acts, ch. 145; Kentucky Statutes § 3952b—4) provides "The commission may compel obedience to its lawful orders by mandamus or injunctions or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction", and further (sec. 9), after prescribing penalties to be imposed upon utilities for neglect or refusal to obey "any lawful requirement or order made by the commission", the Act provides: "Whenever any utility is subject to a penalty under this Act, the commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty."

It thus appears that the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission Counsel upon which he [fol. 102] may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by enforcement of the order against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code § 237; 28 U. S. C. A. § 344). *Morgan v. Rogers*, 284 U. S. 521, 526.

In *Federal Trade Commission v. Claire Company*, 274 U. S. 160, certain corporations challenged the constitutional validity of orders of the Federal Trade Commission requiring them to furnish monthly reports of the cost of pro-

duction, balance sheets and other voluminous information relating to the business in which the complainant corporations were engaged, and sought by injunction to restrain the Commission from enforcing or attempting to enforce the challenged orders. The Court said:

"There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts [fol. 103] for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

* * * Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction."

Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever. *Boise Artesian Water Co. v. Boise City* 213 U. S. 276.

Equity jurisdiction to grant injunctive relief should be exercised only where "in a case reasonably free from doubt" it is shown that "intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney, et al.*, 248 U. S. [fol. 104] 453, 456.

The defendant filed an answer to the bill on the merits without raising the question as to equity jurisdiction. It is pointed out, however, in *Federal Trade Commission v.*

Claire Company, *supra*, that acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, *sua sponte*. *Twist v. Prairie Oil Company*, 274 U. S. 684, 690; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied.

By stipulation the case having also been submitted for final determination, the application for a permanent injunction should be likewise denied, and the bill dismissed for want of equity.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION

Judge HAMILTON, dissenting in part:

I agree with the conclusion of the majority opinion because the Act of May 14, 1934, Chapter 283, Section 1, 48 Stat. 775, U. S. C. A. Title 28, Section 41(1), withdraws from the jurisdiction of the District Courts of the United States suits enjoining the execution of orders of administrative boards or commissions where the laws of the State provide a plain, speedy and efficient remedy for a judicial review.

The laws of the Commonwealth of Kentucky provide for an adequate judicial review of the orders and findings of its Public Service Commission. (Carroll's Kentucky Statutes, 1936 Edition, Sections 3952-1 to 3952-61. The plaintiff alleges in its petition that it does not come within the term "utility or utilities" as defined under Carroll's Kentucky Statutes, 1936 Edition, Section 3952-1, and for that reason this case does not fall within the bar of the Act of May 14, [fol. 105] 1934; but I am of the opinion that this Act, being remedial in its nature, should be liberally construed in order that the Courts of the States may be left free to interpret their own statutes. It may be said, however, that the Public Utilities Act of the Commonwealth of Kentucky includes within its terms all persons, corporations, their lessees, trustees or receivers, producing, manufacturing, storing, dis-

tributing or selling natural or artificial gas for public consumption. The Act of May 14, 1934, cannot be avoided so as to confer jurisdiction on this Court by a naked allegation of the plaintiff that it is not one of the persons coming within the statutory law of the Commonwealth of Kentucky regulating public utilities.

The Commission, in its order, which the plaintiff seeks to enjoin in this action, found that the plaintiff was a public utility and had authority to fix its rates. The language of the Act (48 Stat. 775) expressly prohibits District Courts from enjoining any order of a State rate-making body.

Lower Federal Courts are creatures of the Congress, and their powers are confined within the Acts bringing them into existence, and whatever may be their inherent power incident to jurisdiction, the Congress can take from them the authority to grant injunctions in rate making cases and confer such power on the Courts of the State, even though a Federal constitutional right is involved. *Ex Parte Robinson*, 19 Wall. 505; *Bessette v. Conkey Company*, 194 U. S. 324; *Michaelson v. United States*, 266 U. S. 42, 66; *Gillis, Receiver v. California*, 293 U. S. 62, 67.

If the majority opinion be correct, the Act of May 14, 1934, was wholly unnecessary, because in no event would the Federal Court enjoin the orders of a public utility rate making body if the State law provided an adequate judicial review.

The case of *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561, 570, relied on in the [fol. 106] opinion of the majority, has no application to the case at bar. In the cited case, the Commission sought to compel certain pipe line companies to disclose to it facts to be used in fixing the rates of the distributing companies. The order of the Commission sought to be enjoined did not fix rates, nor was it contended as a basis for relief that the Commission was without authority to inquire into the charges of the Wichita Company. The Court said:

“The Commission’s proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission’s decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate

depending upon them. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 452, et seq. But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & Mackinac Ry. v. Mich. R. R. Comm'n.*, 235 U. S. 402, 405. *Napa Valley Co. v. R. R. Comm'n.*, 251 U. S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas Court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon v. Rutland R. Co.*, 232 U. S. 134, 138. *Missouri v. Chicago, B. & Q. R. Co.*, 241 U. S. 533, 542. *Ex parte Young*, 209 U. S. 123, 166. And upon the issue of confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 289. *Bluefield Co. v. Pub. Serv. Comm'n.*, 262 U. S. 679, 689. *United Railways v. West*, 280 U. S. 234, 251."

The plaintiff's suit here is based solely on the ground that the laws of the Commonwealth of Kentucky do not make it subject to the jurisdiction of the Public Service Commission for any purpose. It therefore follows that if plaintiff's contention be sound, it does not have to await the outcome of administrative action before resort to the Courts to determine its rights. The question in dispute is purely a legal one and is not affected to administrative de-[fol. 107] cision. *Gulf v. Interstate Natural Gas Company*, 82 F. (2) 145, 150.

Federal Trade Commission v. Claire, 274 U. S. 160, 174, does not lend support to the conclusion of the majority. In that case, the Claire Company sought to enjoin an order of the Federal Trade Commission requiring it to submit reports concerning its business, under Section 6 of the Act creating it. The Commission's orders were enforceable only by requesting the Attorney General to institute mandamus proceedings against the recalcitrant, or by supplying him with facts necessary to enforce forfeitures. Any proceeding to compel compliance or to recover forfeitures could only be had in the United States District Court on the law side of the docket. The Court refused to grant equitable relief on the ground it had adequate remedy at law in the

Federal Courts by presenting its defense to the mandatory or penalty action when instituted.

I have always understood the rule to be that the adequate remedy at law which defeats equitable jurisdiction must be such remedy in the Federal Courts, and not in the State Courts, and it must be a remedy which the Federal Courts can administer under the circumstances of the particular case, and any doubt as to the law remedy must be resolved in favor of the equitable.

The Courts have universally held that Federal Equity jurisdiction is to be tested by those rules, principles and usages as administered by the Federal Courts immediately after the adoption of the Constitution, unaffected by State statutes or practices, regardless of the antiquity of the remedy at law in the State Courts. In other words, a case cognizable by a Federal Court of Equity for inadequacy of legal remedy is still such a case regardless of State legislation or practice enlarging legal remedies, and continues thus until the Congress deprives the Federal Courts of jurisdiction.

The majority opinion, without stated legal justification, [fol. 108] and misapplying the *Claire* case, relegates the plaintiff for relief to the Franklin Circuit Court of the Commonwealth of Kentucky, because of the provisions of the Kentucky Statutes, 1936 Edition, Sec. 3952-44.

In the case of *Smyth v. Ames*, 169 U. S. 466, 550, the Court said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

When the violator is an individual the penalties for failure to comply with the orders of the Public Service Commission are not more than \$1,000.00, or confinement in jail for not more than six months, or both, and if a corporation, not less than \$25.00 or more than \$1,000.00 for each violation,

the enforcement thereof to be by the Franklin Circuit Court of the Commonwealth of Kentucky.

In the case of *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 167, the Court, quoting from *Ex parte Young*, 209 U. S. 123, 155, said:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

The case of *New Hampshire Gas & Electric Company v. Morse*, 42 F. (2) 490, 495, is directly in point. In that case the Court said:

"It is not reasonable to hold that a person must violate a law and subject himself to possible fines or imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 30 S. Ct. 286, 54 L. ed. 430."

Compare also: *Risty v. Chicago, R. I. & Pacific Railway Company*, 270 U. S. 378, 390; *City of Fort Worth v. Southwestern Bell Telephone Company*, 80 F. (2) 972; *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 74; *Grandin Farmers Cooperative Elevator Company v. Langer*, 5 F. Supp. 425, affirmed 292 U. S. 605; *City of Commerce v. Southern Railway Company*, 35 F. (2) 331; *Los Angeles Railway Company v. Railroad Commission of California*, 29 F. (2) 140.

For the reasons herein stated, I find myself unable to agree with the majority opinion.

IN UNITED STATES DISTRICT COURT

SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed January 6, 1938

This cause having been submitted upon plaintiff's application for an interlocutory injunction and also upon its application for a permanent injunction, to the Court, composed of Hon. Zen Hicks, Circuit Judge, 6th circuit, and Hon. H. Church Ford and Hon. Elwood Hamilton, District Judges, under Section 266 of the Judicial Code of the United States, the Court, with Judge Hamilton dissenting from its conclusions of law but concurring in the dismissal for want of jurisdiction, finds the facts as follows:

[fol. 110]

FINDINGS OF FACT

(1) Petroleum Exploration is the sole plaintiff and it is a corporation organized and existing under the laws of the State of Maine and duly authorized and qualified to hold property and to do business as a foreign corporation in the state of Kentucky.

(2) The defendant, Public Service Commission of Kentucky, is a body corporate created and existing solely under the laws of the state of Kentucky with power to sue and be sued and in general regulate the rates and practices of public utilities in Kentucky. Its principal office is at Frankfort, in the eastern district of Kentucky; the only other defendants are J. C. W. Beckham, Thos. B. McGregor and James W. Cammack, Jr.; they are all the members of the Commission; the said Beckham is the chairman thereof; and each of them is a citizen of said state residing therein at said Frankfort.

(3) This suit is wholly of a civil nature and (a) arises under the Constitution and laws of the United States and (b) is between citizens of different states. The matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of \$3,000.00.

(4) The plaintiff is engaged, inter alia, in the operation of certain lands in Owsley, Jackson, Clay and Knox counties, Kentucky, for, and the production therefrom it, natural gas. This gas is contained in subterranean strata and is produced by wells sunk thereto from the surface. The

plaintiff's rights to so operate said lands are vested in it by virtue of divers grants from the several land owners, commonly called oil and gas leases, of which exhibit A with the bill of complaint is typical. In addition to its production in the Knox county field the plaintiff also purchases small quantities of gas in that field.

(5) Gas from the plaintiff's properties in Owsley, Jackson and Clay counties is sold by it to the Central Kentucky [fol. 111] Natural Gas Company, hereinafter called "Central" and delivered at the corporate limits of Lexington, Kentucky, by virtue of a contract in writing entered into between the plaintiff and the Central, under date of March 24, 1927 (exhibit S with the bill); and at the corporate limits of Richmond, Kentucky, and Irvine, Kentucky, by virtue of a contract in writing entered into between the plaintiff and D. L. Johnson, under date of December 7, 1927 (exhibit C with the bill), whose rights thereunder have meanwhile been assigned to the Central.

(6) Gas produced from and purchased by the plaintiff in the Knox county field is sold by it to Peoples Gas Company of Kentucky, hereinafter called "Peoples", and delivered at the corporate limits of Barbourville, Kentucky, by virtue of a contract in writing entered into between the plaintiff and the Peoples under date of September 17, 1930, as modified (exhibits D and E with the bill); and at the corporate limits of Corbin, Kentucky, by virtue of a like contract under date of September 29, 1931, as modified (exhibits F, G and H with the bill).

(7) Gas from the plaintiff's Clay county properties is sold by it to the Peoples and delivered at the corporate limits of Manchester, Kentucky, by virtue of a like contract, under date of April 18, 1931, (exhibit I with the bill); and at the corporate limits of Somerset, Kentucky, by virtue of a like contract under date of November 1st, 1932 (exhibit K with the bill), as modified; and is sold to Edwards and Eversole Gas Company and delivered at the corporate limits of London, Kentucky, by virtue of a contract in writing entered into between the plaintiff and said last mentioned company, under date of July 3, 1935 (exhibit L with the bill).

(8) Each of the said contracts for the sale and delivery of gas fixes the price therefor at the point of delivery and

has from nine years upward yet to run. The said contracts between the plaintiff and (a) the Central, (b) said Johnson [fol. 112] (assigned by him to East Kentucky Gas Company and by it to the Central) and (c) said Edwards & Eversole Gas Company, fix the annual minimum quantities of gas to be sold and delivered thereunder. There is not and never has been any affiliation, domination or control between the plaintiff and the Central, said Johnson, said East Kentucky Gas Company, said Edwards & Eversole Gas Company or the firm members of the last mentioned company. All the said contracts were entered into at "arm's length". The plaintiff owns twenty-five thirty-seconds (25/32nds) of the outstanding capital stock of the Peoples, and it owes plaintiff some \$200,000.00.

(9) In order to make deliveries of gas as so contracted for, the plaintiff has constructed or purchased and maintains transmission lines as follows:

(a) From said Owsley-Jackson-Clay county fields to the corporate limits of Lexington, with branch lines to the corporate limits of Richmond and Irvine, sometimes called the "Lexington Line".

(b) From said Clay county field to the corporate limits of Somerset, with branch lines to the corporate limits of Manchester and London, sometimes called the "Somerset Line".

(c) From said Knox county field to the corporate limits of Barbourville and Corbin, sometimes called the "Knox County Line".

The said transmission lines are of metal pipe buried in the ground and laid through lands pursuant to grants from the landowners of rights of way therefor, of which exhibits M and N with the bill are typical. The said transmission line separately mentioned in subparagraphs (a), (b) and (c) last above are not interconnected and are independently operated. All gas passing through said transmission lines is owned exclusively by the plaintiff, and is produced by it as aforesaid, save for small quantities purchased as aforesaid in said Knox county field.

(10) The gas sold and delivered under each of the several contracts above mentioned is distributed by the purchaser to the public in the municipality at which it is de-

livered (save that gas delivered at Irvine is distributed to the public therein and also in Ravenna, adjacent thereto), pursuant to a franchise sold and granted by the municipality under authority of section 164 of the Kentucky Constitution to the distributor or its predecessor for a valuable consideration; and in each instance the municipality, under authority of said section 164, in reference to the franchise, and as parcel thereof (except in the case of Lexington, by separate instrument), in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by the grantee and his/its assigns for gas distributed in the municipality pursuant to the franchise and effective during the term thereof. Save the separate rate contract for Lexington, which expires March 1, 1939, the said franchises have from nine years upward yet to run.

(11) On their own motion and upon the ex parte information of the individual defendants only, the defendant Public Service Commission on May 29, 1937, passed an order finding that plaintiff is an operating utility in the State of Kentucky and subject to defendants' jurisdiction under sections 3952-1-12-13 and 14 of Carroll's Kentucky Statutes, 1936 edition. By this order, defendants also fixed a public hearing before them for June 29, 1937 and ordered plaintiff to "appear at such hearing and present evidence if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable." On the return day, plaintiff filed a plea to the Commission's jurisdiction, in substance setting up the [fol. 114] facts hereinbefore found, which the Commission by order served on plaintiff on July 3, 1937, overruled and reset the said investigation for hearing on its merits on July 29, 1937. July 20, 1937, plaintiff filed an application for a rehearing of said order. Though the Commission did not formally pass upon this application, it admits that it intended and threatened to proceed with said rate hearing (case number 396) on July 29, 1937, and thereafter, and would have so proceeded but for the temporary restraining order sued out by plaintiff in this case upon the filing of the bill on July 24, 1937. Nothing in the way of a traverse

of or of an avoidance of, any of the facts set out in plaintiff's plea to the jurisdiction of the Commission was filed, and all its orders in this matter have been based wholly upon the ex parte information of the defendant members of the Commission.

(12) Exclusive of attorney's fees, the expense to plaintiff of complying with said orders would be more than \$3000.00 in employing appraisers, geologists, engineers, accountants, etc. to show the original and historical cost of its properties, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes. Plaintiff's gas producing and transmitting properties in Kentucky and in question are of a value in excess of \$1,500,000.00. Its gas sales contracts provide for the sale of approximately one billion cubic feet of gas annually at an approximate price of \$350,000.00 and have yet from nine years onwards to run.

CONCLUSION OF LAW

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction."

[fol. 115] It is alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission would be approximately \$25,000. and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this act.

Under the Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1924 Act, ch. 145; Kentucky Statutes section 3952b-4, the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission

Counsel upon which he may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by enforcement of the order against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code section 237; 28 USCA section 344).

[fol. 116] Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever.

Acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, sua sponte.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied. The case having also been submitted on the merits, the application for a permanent injunction should be likewise denied and the bill dismissed for want of equity.

Witness, the United States District Court for the Eastern District of Kentucky, constituted under Section 266 of the Judicial Code of the United States.

This January 6, 1938.

Zen Hicks, U. S. Circuit Judge. Elwood Hamilton,
U. S. District Judge. H. Church Ford, U. S. District Judge.

[fol. 117] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—Entered January 6, 1938

This cause having been submitted simultaneously upon plaintiff's application for an interlocutory injunction, upon its application for a permanent injunction, and for a final decree, to the Court, composed of Hon. Zen Hicks, Circuit Judge, 6th Circuit, and Hon. H. Church Ford and Hon. Elwood Hamilton, District Judges, under Section 266 of the Judicial Code of the United States; the Court, with Judge Hamilton dissenting from its conclusions of law but concurring in the dismissal for want of jurisdiction, delivered written opinions and its separate findings of fact and conclusions of law. The Court orders the opinions and the separate findings, etc., filed. Plaintiff excepts to the Court's conclusions of law. The Defendants except to that part of the Court's third finding of fact that the matter in controversy in this suit, exclusive of interest and cost, exceeds the sum of Three Thousand Dollars (\$3,000.00).

Conformably to its opinion and separate findings of fact and conclusions of law, the Court orders and decrees that the application of plaintiff, Petroleum Exploration, Inc., for an interlocutory injunction and also its application for a permanent injunction be and they are hereby respectively denied; that the temporary restraining order be and it is now discharged; that plaintiff's bill of complaint be and it is hereby finally dismissed without prejudice to any proper proceeding, and all for want of jurisdiction in equity herein; and that plaintiff pay the costs of this proceeding, to all which order and decree the plaintiff excepts.

Pursuant to due waiver of notice by the defendants and by the Governor and Attorney General of Kentucky, through their counsel in open court, plaintiff heretofore tendered its petition for a rehearing and in the alternative [fol. 118] its petition for an injunction or continuance of

the restraining order pending the determination of its appeal to the Supreme Court of the United States.

It is ordered that said petition for rehearing and said petition for the alternative continuance of the restraining order, or for an injunction pending appeal, be and they are now filed.

The said Court having considered plaintiff's petition for rehearing and in the alternative its petition for an injunction or continuance of the restraining order pending the determination of its appeal to the Supreme Court of the United States, and the Court being advised overrules said petition for rehearing and also overrules said petition for an injunction or continuance of the restraining order pending appeal to the Supreme Court of the United States, to all of which plaintiff excepts.

In order to give plaintiff an opportunity to perfect its appeal herein to the Supreme Court of the United States, it is hereby ordered that this order and decree, insofar as it denies an injunction and dissolves the temporary restraining order, be stayed for a period of thirty (30) days from the date hereof.

This January 6, 1938.

Zen Hicks, U. S. Circuit Judge. Elwood Hamilton,
U. S. District Judge. H. Church Ford, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR INJUNCTION PENDING APPEAL—
Tendered December 5, 1937, Filed January 6, 1938

For its petition to the Court, constituted under Section 266 of the Judicial Code of the United States, plaintiff, [fol. 119] Petroleum Exploration, Inc., respectfully refers to its Bill in Equity and shows unto the Court as follows:

On or about November 13, 1937, the defendants in the above styled cause served upon plaintiff through the United States mails a further order in words and figures as follows:

“BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

“A meeting of the Public Service Commission was held on this date; present: Chairman Beckham, Commissioners Cammack and McGregor.

Case No. 396

"In the Matter of Investigation on Motion of the Commission of the Rates, Rules, and Practices of the Petroleum Exploration, Inc.

Order

"This cause coming on to be heard on the petition for rehearing and amended and supplemental plea to the jurisdiction of the commission filed by the Petroleum Exploration, Inc., on July 20, 1937, and the Commission being advised,

"It is Ordered, That the petition for rehearing be and hereby it is overruled, and that the amended and supplemental plea to the jurisdiction of the Commission be and hereby it is overruled, and that this action be and hereby it is set down for formal hearing on December 7, 1937, at 10:00 o'clock A. M., on the notice of investigation and order to show cause issued by the Commission herein on May 29, 1937, to all of which the Petroleum Exploration, Inc., objects and excepts.

"This the 10th day of November, 1937.

[fol. 120] "Public Service Commission of Kentucky, by Chas. J. White, Secretary."

Said order was entered without notice to plaintiff, in its absence, and ex parte.

The defendants are threatening to proceed with the said unlawful order and investigation on December 7, 1937, will enter numerous other orders therein against plaintiff, and are insisting that the same are and will be valid and enforceable. As plaintiff is thereby informed and believes, defendants immediately will invoke the processes of the courts of Kentucky provided under color of said Public Service Commission Act to coerce plaintiff's obedience to said order and defendants will proceed against plaintiff for a writ of mandamus in the courts of Kentucky to compel obedience to said order, or will institute proceedings therein against plaintiff to forfeit the penalties prescribed by said act for each failure by plaintiff to observe the Commission's orders in said case or defendants will cause plaintiff's officers, agents, and employees to be indicted in criminal prosecutions in the state courts for said failures or for aiding or abetting therein, or will cause all or various

of said proceedings to be instituted against plaintiff, its officers, agents and employees. Unless the restraining order herein be continued pending appeal or unless defendants be enjoined from proceeding on the said order, as prayed in plaintiff's bill, plaintiff, as it is informed and believes, will be immediately required and coerced by defendants to expend uselessly the said great sum of at least \$25,000. [fol. 121] in complying with said order and for the recovery of which it has no remedy at law or in equity.

Plaintiff has no plain, adequate or safe remedy at law and none save in equity to prevent the injuries it seeks herein to avoid.

Wherefore, plaintiff prays that the Court enjoin the defendants pending the final determination of its appeal from proceeding on or causing or instituting any action to enforce, their said notice of investigation and order to show cause, and in all the respects prayed in plaintiff's bill, and for all appropriate relief.

C. N. Kimball, E. C. O'Rear, W. J. Brennan, Allen Prewitt, Attorneys for Plaintiff.

Duly sworn to by Allen Prewitt. Jurat omitted in printing.

[fol. 122]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed January 6, 1938

To the Honorable Judges of the District Court of the United States for the Eastern District of Kentucky:

Your petitioner, Petroleum Exploration, a Maine corporation, respectfully shows:

July 24, 1937, petitioner filed its bill of complaint in the United States District Court for the Eastern District of Kentucky against the defendants, Public Service Commission of Kentucky, a Kentucky body corporate and a public utility regulatory authority of that State, authorized by law to sue and be sued, and against J. C. W. Beckham, Thomas B. McGregor and James W. Cammack, all its individual members, and all citizens and residents of Kentucky. Thereby, petitioner sought an interlocutory order and final decree enjoining the defendants from proceeding under their order requiring this petitioner, at a neces-

sary cost to it of \$25,000, to show conclusively the fairness and reasonableness of its agreed prices received for natural gas at wholesale under private contracts with its three customers, Central Kentucky Natural Gas Company, a corporation, Edwards & Eversole, a co-partnership, and Peoples Gas Company of Kentucky, a corporation. Petitioner sought such relief upon the ground therein set forth that these respective sales of natural gas were not to the public or to any portion of it but were severally private and that to subject them to the rate regulatory jurisdiction of defendants under Sections 3952-1 to 3952-61, inclusive, of Carroll's Kentucky Statutes, 1936 Edition, is to deprive petitioners of its property without due process of law, contrary to the Constitution of the United States; also upon the ground that the rates which the said customers of petitioner receive from the public for said gas are fixed by franchise contracts the obligations of which cannot be impaired either under the laws of Kentucky [fol. 123] or under the Constitution of the United States and that so to regulate them is to take petitioner's property not for public use but for the private benefit of its said three customers, without due process and in denial of the equal protection of the laws, as aforesaid.

Upon the filing of petitioner's application for the said interlocutory and final injunction, the same came on for hearing on August 7, 1937, before the Hon. Zen Hicks, Judge of the Circuit Court of Appeals of the United States for the 6th Circuit, Hon. H. Church Ford, Judge of the United States District Court for the Eastern District of Kentucky, and Hon. Elwood Hamilton, Judge of the United States District Court for the Western District of Kentucky, constituting a District Court under section 266 of the Judicial Code of the United States.

Thereafter, on the 6th day of January, 1938, said court made and filed herein separate findings of fact and conclusions of law, and entered an order and decree denying said interlocutory injunction and denying said permanent injunction, dismissing the petitioner's bill of complaint, and overruling its petition for an injunction pending appeal, to all of which it expected.

The said decree denying said interlocutory injunction and also denying a final injunction, and injunction pending appeal is greatly to the prejudice and injury of your petitioner and is erroneous and inequitable.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignments of error and prayer for reversal, filed with the clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain [fol. 124] relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of an appeal in said cause to the Supreme Court of the United States agreeably to the statutes and rules of said Court in such cases made and provided, and that a proper order touching the security required of the petitioner may be made.

This January 6, 1938.

C. N. Kimball, W. J. Brennan, Edward C. O'Rear,
Allen Prewitt, Solicitors for Petitioner.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 6, 1938

Comes Petroleum Exploration, Inc., plaintiff and appellant in the above entitled cause and appeal, and in connection with its petition for an appeal, says that the decree entered between these parties by the United States District Court for the Eastern District of Kentucky, on the 6th day of January, 1938, is erroneous and unjust to appellant:

First. Because the court in said decree failed to adjudge that plaintiff's production of natural gas from private lands pursuant to grants of "oil and gas leases" for the purpose, and the transmission of such gas through the pipe lines laid across private lands pursuant to grants of "rights of way" for the purpose, and the sale and delivery of such gas at the corporate limits of the city of Lexington in the State of Kentucky, only and specially to Central Kentucky Natural Gas Company, by virtue of a contract in writing entered into at arms' length in the open market between it and the plaintiff on the 24th day of March, A. D.

1927, being exhibit B with the plaintiff's bill of complaint, was and is a private, and not a public utility, enterprise and not subject to regulation by the order of the Public Service Commission of Kentucky of the price for such [fol. 125] gas fixed by said contract, in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

Second. Because the court in said decree failed to adjudge that the plaintiff's like production and transmission of natural gas, as set forth in paragraph First above, and the sale and delivery of such gas at the corporate limits of the cities of Richmond and Irvine in the State of Kentucky only and specially to said Central Kentucky Natural Gas Company by virtue of a contract in writing entered into between the plaintiff and D. L. Johnson at arms' length in the open market on the 7th day of December, A. D. 1927, being exhibit C with the plaintiff's bill of complaint, the rights of said Johnson having been assigned to said Central Kentucky Natural Gas Company, was and is a private enterprise, not a public utility one, and not subject to regulation by the Public Service Commission of Kentucky of the price for such gas fixed by said contract, in violation of the said due process clause.

Third. Because the court in said decree failed to adjudge that the plaintiff's like production and transmission of natural gas, as set forth in paragraph First above, and the sale and delivery of such gas at the corporate limits of the city of London in the State of Kentucky only and specially to the Edwards & Eversole Gas Company by virtue of a contract in writing entered into between it and the plaintiff on the 3rd day of July, A. D. 1935, at arms' length in the open market, being exhibit L with the bill of complaint, was and is a private enterprise, and not subject to regulation by the Public Service Commission of Kentucky of the price for such gas fixed by said contract, in violation of said due process clause.

[fol. 126] Fourth. Because the court in said decree failed to adjudge that the price for gas sold and delivered by the plaintiff only and specially to its partly owned subsidiary, Peoples Gas Company of Kentucky, at the corporate limits of each of the cities of Barbourville, Corbin, Manchester and Somerset, in the state of Kentucky, pursuant to written

contracts entered into between them fixing each such price, being exhibits D to K, inclusive, with the bill of complaint, was merely an inter-company transaction and not subject to the direct regulation by the Public Service Commission of Kentucky, in violation of the said due process clause, whatever might be the power of the said Commission to regulate the rates at which said subsidiary sells such gas to the public in each of said cities and allow a reasonable price for such gas as an operating expense of the said subsidiary, which might divide its receipts from the public with the plaintiff as they agreed.

Fifth. Because the court in said decree failed to adjudge that each of the several franchise-rate contracts entered into between the said Central Kentucky Natural Gas Company and the said city of Lexington (being exhibits O, P and Q with the said bill of complaint), the said D. L. Johnson (whose rights thereunder were thereafter assigned to said Central Kentucky Natural Gas Company) and each of said cities of Richmond (being exhibit R with the said bill of complaint), Irvine (being exhibit S with the said bill of complaint) and Ravenna (being exhibit T with the said bill of complaint), the said Peoples Gas Company of Kentucky or its predecessors and each of said cities of Barbourville (being exhibit U with the said bill of complaint), Corbin (being exhibits V, W and X with the said bill of complaint), Manchester (being exhibit Y with the said bill of complaint), and Somerset (being exhibit Z with the said bill of complaint), and the said Edwards & Eversole Gas Company and said city of London (being exhibit AA with the said [fol: 127] bill of complaint), fixing rates to be charged for gas distributed in each of said cities, respectively, was entered into by each such city pursuant to the specific authority of section 164 of the Kentucky Constitution as construed by the decisions of the Court of Appeals of Kentucky, that being the court of last resort in said state, and by virtue of the contract clause of the Constitution of the United States suspended during the respective term of each of said franchise-rate contracts the rate making power; and the threatened reduction now in price of gas sold and delivered by the plaintiff to each of said distributors for distribution in each of said cities would not be in the public interest but for the private benefit of such distributor, in violation of said due process clause.

Sixth. Because the court in said decree failed to adjudge that each of the plaintiff's said private enterprises mentioned in paragraphs First, Second and Third hereof is not within the purview of Ky. Stat. 3952-1 (c), defining "utilities" made subject to the jurisdiction of the said Commission by Ky. Stat. 3952-12, 1936 edition.

Seventh. Because the court in said decree failed to adjudge that the price for gas fixed by each of the contracts hereinabove mentioned between the plaintiff and said Central Kentucky Natural Gas Company, D. L. Johnson, Edwards & Eversole Gas Company and Peoples Gas Company of Kentucky, is not within the purview of Ky. Stat. 3952-1 (e), defining a "rate"; or within the purview of Ky. Stat. 3952-14, giving the said Commission jurisdiction to fix "rates, joint rates, tariffs, tolls or schedules."

Eighth. Because the court in said decree did adjudge that plaintiff may passively stand on its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the state courts of Kentucky under Ky. Stat. 3952-13 and 3952-61 without, in the meantime, suffering any injury or damage or being [fol. 128] compelled to incur any expense whatever, and thereby has an adequate remedy at law in said courts.

Ninth. Because the court in said decree failed to adjudge that the plaintiff would be put to the unnecessary expense of \$21,500.00 or more, for the recovery of which it would have no remedy whatsoever, in complying with the said Commission's order of May 29, 1937, requiring the plaintiff to "present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state" (Kentucky), except under pain of forfeiting its right to be heard at the unlawful investigation initiated by the said Commission and permitting said Commission to proceed therewith and fix the prices for gas sold by the plaintiff under its said contracts hereinabove mentioned upon its, the said Commission's, own evidence and of forfeiting its, the plaintiff's right to a judicial review of the said Commission's action under Ky. Stat. 3952-44 and 3952-51; and except, under menace of the penalties and criminal prosecutions prescribed by Section 3952-61.

Tenth. Because the court in said decree adjudged that the plaintiff has an adequate remedy at law in the state courts of Kentucky by defending original mandamus or penal proceedings by the Commonwealth of Kentucky ousting the jurisdiction of the United States District Court herein.

Eleventh. Because the court denied plaintiff's applications for an interlocutory injunction and for a permanent injunction and dismissed its bill of complaint.

Wherefore, the plaintiff prays that the said order and decree be reversed and the District Court directed to enter a decree granting plaintiff a permanent injunction, enjoining the defendants from proceeding with their investigation and rate hearing No. 396 against plaintiff severally in [fol. 129] respect of plaintiff's sales of natural gas to each of its three customers, aforesaid, as prayed in its bill of complaint, and for such further decree as may be proper on the record.

C. N. Kimball, W. J. Brennan, Edward C. O'Rear,
Allen Prewitt, Solicitors for plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered January 6, 1938

The petition of Petroleum Exploration, Inc., the complainant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Eastern District of Kentucky, having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this court and the record in this cause having been considered;

It is hereby Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decrees of the District Court of the United States for the Eastern District of Kentucky, entered in this cause on the 6th day of January, 1938, and that the Clerk of the said District Court of the United States for the Eastern District of Kentucky shall, within forty days from this

date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 130] It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of One Thousand Dollars (\$1,000.00) conditioned as required by law. Whereupon, came the plaintiff and tendered such bond with Ætna Casualty and Surety Company, Hartford, Connecticut, as surety, and the Court having examined said bond, approves the same, and it is ordered filed.

Done by the Court this 6th day of January, 1938.

Zen Hicks, U. S. Circuit Judge. Elwood Hamilton,
U. S. District Judge. H. Church Ford, U. S. District Judge.

[fol. 131] Bond on appeal for \$1,000.00, approved and filed January 6, 1938, omitted in printing.

[fols. 132-148] Citation, in usual form, showing waiver of service, filed January 6, 1938, omitted in printing.

[fol. 149] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 6, 1938

To the Clerk of the United States District Court, Eastern District of Kentucky, at Frankfort:

Please prepare and complete transcript of the record in this case to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal taken, allowed and perfected to said Court, including in your transcript the following pleadings and papers on file, to-wit:

1. The bill in equity and with agreed condensed statement of exhibits entitled "agreed summary of exhibits."
2. Order approving condensed statement of exhibits.
3. Order granting temporary restraining order.
4. Bond on temporary restraining order.

5. Answer.
6. Motion for temporary injunction.
7. Order of Submission.
8. Condensed statement of evidence.
9. Order approving condensed statement.
10. Opinion.
11. Separate findings of fact and conclusions of law.
12. Order and decree.
13. Plaintiff's petition for injunction pending appeal.
14. Petition for appeal.
15. Assignment of errors.
16. Order allowing appeal.
17. Notice under Rule 12 with waiver of service.
18. Cost bond.
- [fol. 150] 19. Citation with waiver of service.
20. Statement as to jurisdiction.
21. This præcipe.
22. Designation of parts of record to be copied, with waiver of service.
23. Clerk's certificate.

Said transcript to be prepared as required by law and rules of the Supreme Court of the United States, and filed in the office of the Clerk of said Court at Washington, D. C., not later than 15 day of February, 1938.

E. C. O'Rear, W. J. Brennan, Allen Prewitt, Attorneys for Plaintiff.

The defendants by attorney hereby waive service of copy of the foregoing præcipe and approve its contents.

Hubert Meredith, Atty. Gen.; J. W. Jones, Asst.
— Gen., Attorneys for Defendants.

[fol. 151] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed January 6,
1938

The parties to this cause stipulate that the foregoing is a true, full and complete transcript of the record, as required by the præcipe approved by the parties.

W. J. Brennan, Allen Prewitt, Attorneys for Appellant. J. W. Jones, Attorney for Appellees.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 152] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED—Filed January 15, 1938

Comes the appellant and adopts its assignment of errors as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

This 6th day of January, 1938.

E. C. O'Rear, W. J. Brennan, Allen Prewitt, Attorneys for Appellant.

Service waived. J. W. Jones, Attorney for Appellees.

[File endorsement omitted.]

Endorsed on cover: Enter E. C. O'Rear. File No. 42,186. E. Kentucky, D. C. U. S. Term No. 705. Petroleum Exploration, Inc., appellant, vs. Public Service Commission of Kentucky, et al. Filed January 15, 1938. Term No. 705, O. T., 1937.

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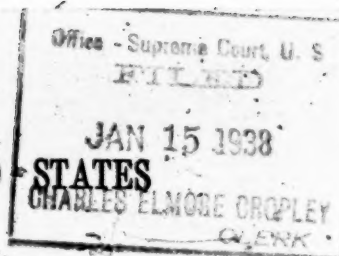
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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937



No. 705

PETROLEUM EXPLORATION, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 705

PETROLEUM EXPLORATION, A MAINE CORPORATION,
Appellant,
vs.

PUBLIC SERVICE COMMISSION OF KENTUCKY
ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

Filed Jan. 6, 1938.

(a)

Jurisdiction of the Supreme Court.

This appeal is prosecuted under U. S. C. title 28, Sections 345 and 380, from a decree of a United States District Court of three judges assembled under section 380.

(b)

The Statute and Administrative Orders Involved.

There is involved the validity of the "Public Service Commission Act" adopted by the legislature of Kentucky as it is applied to the appellant, who was the plaintiff below. Primarily, there is involved the validity of certain administrative orders of the Public Service Commission of Kentucky directed against appellant.

The Act—It is officially printed as chapter 145 of the *Kentucky Acts of 1934*, effective June 14, 1934, as amended by chapter 92 of the *Kentucky Acts of 1936*, effective May 16, 1936. Also, it appears as Sections 3952-1 to Sections 3952-61, inclusive, of *Carroll's Kentucky Statutes, 1936 Edition*, cited as "Ky. Stats., 1936." Its general purpose was to create the Public Service Commission of Kentucky, called the "commission," as an agency of that Commonwealth with power to regulate the rates and practices of certain businesses defined as public utilities, called "utilities." Its pertinent provisions may be summarized as follows:

Utilities—The Act defines as a utility or utilities, *inter alia*, any corporation that may own, control, operate or manage any facility used "for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other purposes; any facility used or to be used for or in connection with the transportation or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *." (Ky. Acts 1936, c. 92, section 1; *ib.*, 1934, c. 145, Sec. 1; Ky. Stats. 1936, Sec. 3952-1.)

The Commission—The Act establishes the commission as an administrative body corporate composed of three members appointed by the Governor, and authorizes it to sue and

be sued in its corporate name (Ky. Acts 1934, c. 145, Sec. 2; Ky. Stats. 1936, Sections 3952-2, -3.)

General Powers—It extends the jurisdiction of the commission to all utilities enumerated by the Act. It authorizes the commission to investigate utilities, to require them to conform to its lawful and reasonable rules, regulations and orders. It gives the commission power to require of utilities "information desired by the commission relating to any investigation or requirement." The commission may compel obedience to its lawful orders by mandamus or injunction or other proceedings in the Franklin Circuit Court of Kentucky or other court of competent jurisdiction (Ky. Acts 1934, c. 145, Sec. 4a, 4b; Ky. Stats. 1936, Sections 3952-12, -13).

Investigation and Rate Changes—Whenever after a hearing on reasonable notice, in an investigation (Ky. Acts 1934, c. 145, Sec. 6 (a); Ky. Stats. 1936, Sec. 3952-33), the commission finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory, the commission shall by order require just and reasonable rates, etc. (Ky. Acts 1934, c. 145, Sec. 4(c) 1; Ky. Stats. 1936, Sec. 3952-14).

Contract Rates—The Act purports to authorize the commission after a hearing to abrogate any charges, tolls, schedules or service standards of any utility that are now fixed or that in the future may be fixed, by any contract, franchise or otherwise "between any municipality and any such utility." (Ky. Acts 1934, c. 145, Sec. 4(n); Ky. Stats. 1936, Sec. 3952-27.)

Elements of fair value—The commission is authorized to ascertain and fix the value of the property of any utility for all such purposes. In so doing, "it shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law

of the land for rate making purposes. (Ky. Act 1934, c. 145, Sec. 4(f); Ky. Stats. 1936, 3952-19.)

Burden of Proof—In all cases, it is on the party complaining of any order or direction of the commission (Ky. Act 1934, c. 145, Sec. 7(f); Ky. Stats. 1936, 3952-49).

Procedure—The Act provides for the initiation of investigations upon complaint or upon the commission's own motion; for hearings, for application for a rehearing of "any determination made by the commission in any hearing"; and for keeping a complete record of all contested proceedings (Ky. Acts 1934, c. 145, Sections 6a to 6k, inclusive; Ky. Stats., 1936, Sections 3952-33 to 3952-43, inclusive).

Court Review—Any party affected by an order of the commission may within 20 days after service upon it of a copy of such order or of the order overruling any petition for rehearing commence an action against the commission in the Franklin Circuit Court of the State or in any other court of competent jurisdiction to vacate or set aside such order on the ground that it is unlawful or unreasonable. No new evidence shall be heard by the court, but it may remand the matter to the commission to hear newly discovered evidence. (Ky. Acts 1934, c. 145, Sections 7(a), 7(b); Ky. Stats. 1936, Sections 3952-45.)

Penalties—Every officer, agent or employee of any enumerated utility who shall willfully violate any provisions of the Act, or who aids or abets any violation thereof by such utility, shall upon conviction be fined not more than \$1,000.00 or imprisoned not longer than six months or both.

Any enumerated utility violating the Act or failing, neglecting or refusing to obey any lawful order or requirement of the commission, for every such violation, failure or refusal shall forfeit to the State not less than \$25, and not more than \$1,000, for each such offense. Whenever a utility is subject to such penalty, the commission shall certify the

acts to the Commission Counsel (*ex officio*, an assistant Attorney General), who shall institute an action in the Franklin Circuit Court of Kentucky in the name of the Commonwealth of Kentucky, for its recovery. With the court's consent, the commission may compromise such actions.

The Orders.

The primary order of the commission, the validity of which is involved, is as follows:

"NOTICE OF INVESTIGATION AND ORDER TO SHOW CAUSE

"WHEREAS, An examination of the reports of several wholesale and retail gas utilities serving in this State, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"WHEREAS, The Commission has found under Sections 3952-1-12-13, and 14, that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"WHEREAS, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"WHEREAS, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"WHEREAS, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"NOW, THEREFORE, NOTICE IS HEREBY GIVEN, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on

June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"WHEREAS, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"NOW, THEREFORE, IT IS ORDERED:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

"2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

"3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust, association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed classification of such charges showing separately

such class of service and the charges therefor and amounts cleared to each account.

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"NOTICE IS HEREBY GIVEN to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937.

(S.)
[SEAL.]

CHAS. J. WHITE,
Secretary."

Subsequent orders of the commission overruled the plea of Petroleum Exploration to the jurisdiction of the commission, set the investigation for formal hearing on July 29, 1937, and (after the institution of this suit) overruled a petition for a rehearing of the question of jurisdiction, and reset the investigation for December 7, 1937.

(c)

Date of Decree and of Application for Appeal.

The decree sought to be reviewed is dated the 6th day of January, 1938. The application for appeal is presented the 6th day of January, 1938.

(d)

Nature of the Case.

1) *Federal jurisdiction*—Plaintiff, Petroleum Exploration, Inc., is a corporation organized under the laws of the State of Maine. The defendant commission is a Kentucky body corporate and its defendant members are citizens and residents of that State. More than \$3,000.00 is in controversy, exclusive of interest and costs. Also, the case arises under the Constitution of the United States.

2) *Equity jurisdiction*—Because various material recitals in the orders of the commission are contrary to the facts and for other, affirmative reasons stated on the merits, plaintiff maintains that under the 14th Amendment to the Constitution of the United States it is not subject to the investigation ordered by the commission and which it seeks to enjoin. Without its showing being questioned, plaintiff establishes that the necessary expense of such investigation to it would be approximately \$25,000, exclusive of attorney fees. Such sum would be required in (“conclusively”) sustaining the fairness or reasonableness of the prices plaintiff receives for natural gas by the prescribed evidences (see “b” hereof, “elements of fair value”, pp. 3-4).

Plaintiff has not recourse at law or otherwise for the recovery of this large sum or any sum spent by it in an unauthorized and hence fruitless investigation by the commission.

In their verified answer, filed by the Attorney General, who is the chief law enforcement officer of the State, defendants admit they, notwithstanding a petition for rehearing then undetermined by them, threatened to proceed upon their order of investigation hereinbefore set out and would have done so but for the temporary restraining order obtained by plaintiff in this case, and aver “that said proceeding would have been lawful, reasonable, useful and needful.” Upon disobedience in such case, the Act mandatorily requires the defendants to institute proceedings in the State court to recover the prescribed forfeitures. Also, according to these statements of the commission, it follows that plaintiff’s officers, agents and employees aiding or abetting in its failure to heed the commission’s orders, are mandatorily liable under the Act to either fine or imprisonment or both (see “b” hereof “penalties”, p. 4).

By a divided bench, the District Court held that plaintiff has an adequate remedy at law in the State courts, denied

interlocutory and final injunctions and dismissed the bill for supposed want of equity. It held that plaintiff's right to interpose its constitutional defenses to mandamus or penal actions against it in the State courts to enforce an unlawful or unauthorized investigation is an "adequate remedy".

Such remedy in the State courts is not of a character afforded under any circumstances by the Federal Courts of law. (U. S. C. title 28, Section 384; *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. Ed. 819, 838, 18 Sup. Ct. Rep. 418; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 126, 74 L. Ed. 737, 749, 50 Sup. Ct. 270.)

The Federal District Courts of law have no general jurisdiction of original mandamus suits, (*U. S. v. Lake Shore, etc., Co.*, 197 U. S. 536, 49 L. Ed. 870; *Covington, etc., Bridge Co. v. Hager*, 203 U. S. 109, 51 L. Ed. 111; not removable, *State v. White River, etc., Ry. Co.*, 27 S. D. 69, 129 N. W. 1036.)

The Federal District Courts of law could not entertain penal actions or prosecutions brought in the name of the Commonwealth of Kentucky (U. S. C. title 28, Section 341).

Rules of comity or convenience do not require plaintiff to litigate purely constitutional defenses in the state courts at the risk of losing its right to come afterwards to the district court of the United States by reason of the matters having become *res adjudicata* (*Oklahoma Gas Co. v. Russell*, 261 U. S. 291, 293, 67 L. Ed. 659, 43 Sup. Ct. 353).

Also, plaintiff is entitled to the determination of constitutional rights without meanwhile being in peril of losing upwards of \$20,000 required in the investigation or risk of forfeitures, or its officers, agents or employees being placed in fear of fine and imprisonment (cf. *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 59 L. Ed. 405, 35 S. Ct. 214; *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441; *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 57 L. Ed.

1507, 33 S. Ct. 961; *New Hampshire Gas & Electric Co. v. Morse*, 42 F. (2d) 490, 495).

3) *The "Johnson Act"*—The Act of May 13, 1934, was not considered applicable by the two concurring judges of the District Court, so we were informed. That Act withdrew the jurisdiction of the court only if the commission's order "affects rates chargeable by a public utility", and was made after a "hearing". (May 14, 1934, c 283, Sec. 1, 48 Stat. 775; Judicial Code, Sec. 24, amended; U. S. C., Title 28, Section 41-1). The suit is not levelled at an order as "affecting rates," but at an unauthorized and otherwise unlawful investigation (cf. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. Ed. 984, 36 S. Ct. 583, Ann. Cas. 1916 D 765). Also, a primary question on the merits is whether plaintiff is acting as a public utility severally in respect of its sales of gas to three wholesale buyers—the Act in terms assumes public utility status. Furthermore, it is expressly confessed in answer by the defendants that their orders were rested not on evidence adduced at a hearing after notice, but on "merely statements made by the commission based on the general information of the members of said Commission." Thus, they were not made after a "hearing", as conditioned by the Johnson Act. (cf. *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 71, 79 L. Ed. 761, 769; *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.* (1913), 227 U. S. 88, 93-4, 57 L. Ed. 431, 434).

Statutory Review—Though no supersedeas is provided by the Act, if plaintiff's remedy was by suit under the Act to vacate the order (Ky. Acts 1934, c. 145, Sections 7 (a), 7 (b), Ky. Stats., 1936 Ed., Section 3952-44), such proceeding is judicial and is assimilable to the usages of the district courts of the United States (*Cowley v. Northern P. R. Co.* (1895), 159 U. S. 569, 40 L. Ed. 263, 16 Sup. Ct. Rep.

127; *Louisville & N. R. Co. v. Western U. Telg. Co.* (1914), 234 U. S. 369, 58 L. Ed. 1356, 34 Sup. Ct. Rep. 810; *Commissioners, etc., v. St. Louis Southwest Railway Co.*, 257 U. S. 547, 66 L. Ed. 364). In the alternative the bill prays a vacation of the order. If vacation of the order and not injunction was plaintiff's remedy, it was ground for dissolving the three judge court, but not for dismissing the bill (cf. *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088).

4) *The Merits*—The order of investigation offends due process and is unauthorized for the following reasons:

(i) Plaintiff produces and sells natural gas at wholesale only, and to three particular buyers. It does so under formal, written contracts all antedating the Public Service Commission Act of Kentucky, and having nine years upwards to run. It prays several relief in respect of its sales to each, viz., Central Kentucky Natural Gas Company of Kentucky, called the "Central Company", Edwards & Eversole Gas Company, a copartnership of Edwards and Eversole, and Peoples Gas Company of Kentucky, called the "Peoples Company".

It has gas producing leases in Owsley, Jackson and Clay Counties, Kentucky, from which it produces and delivers gas to the Central Company at the corporate limits of the towns of Lexington, Richmond and Irvine, Kentucky. The gas is delivered from the gas leases by transmission pipes laid across lands pursuant to grants from the landowners of rights of way for the purpose, a delivery system known as plaintiff's "Lexington line". Plaintiff produces and owns all gas transmitted through this line. Plaintiff sells to the Central under two contracts fixing the price and made "at arm's length" seven years prior to the Public Service Commission Act of Kentucky and having ten years yet to run. No sort of affiliation or control, direct or remote, has

ever existed between vendor and vendee in these two whole-sale contracts.

Plaintiff's business of wholesaling natural gas specially to the Central Company is not public utility¹ and defendants may not by fiat of their order treat it as such, contrary to the due process clause of the 14th Amendment.² Though our research does not disclose that the Supreme Court has directly decided the question, we construe that the Court has assumed that such single wholesaling at arm's length is not public utility. (*Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 127, 76 L. Ed. 655—headnote 4; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290, 308, 78 L. Ed. 1267, 1279—headnote 15).

Also, plaintiff has a similar but separately operated pipe line from its Clay County, Kentucky, gas leases to the corporate limits of Somerset, Kentucky, with branch lines to the corporate limits of Manchester and London, Kentucky, called its "Somerset Line". It likewise produces and owns all the gas transmitted through this line. It sells a portion to Edwards & Eversole, under a contract similarly made at arm's length. Neither has any affiliation or control ever existed between plaintiff and Edwards & Eversole, and plaintiff likewise contends that this business is not public utility.

¹ *Nowata County Gas Co. v. Henry Oil Co.* (8th C. C. A.), 269 Fed. 742; *Texoma Natural Gas Co. v. Railroad Commission of Texas*, 59 F. (2d) 750; Accord: *Southern Ohio Power Co. v. Public Utilities Commission* (Ohio Sup.), 143 N. E. 700, 34 A. L. R. 71; *United States v. Uncle Sam Oil Co.*, 234 U. S. 548, 651-2, 58 L. Ed. 1459, 1471, Syl. 4; *State of Washington, etc. v. S. & I. E. R. R. Co.*, 89 Wash. 599, 154 Pac. 110, L. R. A. 1918 c. 675; *Chippewa Power Co. v. Railroad Commission* (Wis. 1925), 205 N. W. 900; *Gully v. Interstate Natural Gas Co.*, 4 F. Supp. 697, 8 F. Supp. 174, 82 F. (2d) 145, 150.

² *Michigan Public Utilities Commission v. Duke* (1925), 266 U. S. 570, 577-8, 69 L. Ed. 445, 45 Sup. Ct. 191.

Plaintiff sells the remainder of the gas from its Somerset line to its other customer, Peoples Gas Company of Kentucky, at the corporate limits of Somerset and Manchester, Kentucky. It also has a similar pipe line from its Knox County gas leases, known as its "Knox County line," to the corporate limits of Barbourville and Corbin, Kentucky, from which it wholesales gas to this Peoples Company at those places. In addition to the gas produced from its Knox County leases, plaintiff purchases in the field a small quantity of gas transmitted through this line and owns all the gas conveyed through it. Plaintiff owns 25/32nds of the capital stock of the third customer, the Peoples Company. The Commission is without jurisdiction to regulate the wholesale prices charged by the appellant to its affiliate, Peoples Gas Company of Kentucky, as that would be an unwarranted interference with private inter-company transactions contrary to the due process clause, whatever might be the power of the Commission to regulate the rates at which the affiliate distributes gas to the public, allowing a reasonable charge for gas so purchased as an operating expense of the affiliate, which, however, could divide the revenues received from the public with the appellant as they saw fit (*United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 320-1, 73 L. Ed. 390, syl. 14). Nevertheless, were the sales to this affiliate public utility ones, that fact would not so render the others made at arm's length to the two companies that are strangers (cf. *Terminal Taxi Cab Co. v. Kutz* (1916), 241 U. S. 252, 60 L. Ed. 984).

(ii) Plaintiff also contends that the order is unauthorized by the Act in that it does not sell or distribute gas "to" the public. Nor, does it produce or transmit natural gas "for" the public as contemplated by the statute. Nor is a special contract price with a wholesale buyer properly a "rate." (*State of Washington v. S. & I. E. R. R. Co.*, 99 Wash. 599,

154 Pac. 110, L. R. A. 1918, c. 675; *Chippewa Power Co. v. Railroad Commission* (Wis. 1925), 205 N. W. 900.) But, if in error in construing the statute, it offends due process as does the commission's order.

(iii) Each of the three wholesale buyers from the plaintiff distributes and retails the gas to the public in the municipality at which delivered, except that gas delivered at Irvine is also distributed in the contiguous town of Ravenna. In each municipality the buyer resells the gas pursuant to a franchise contract existing between such distributor and the municipality, granted by the municipality pursuant to Sections 163 and 164 of the Constitution of Kentucky. In each the municipality by the authority of those sections, in reference to the franchise, and in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by the grantee and his/its assigns for gas distributed in the municipality pursuant to the franchise and effective during the term thereof, save in the case of Lexington such rates were originally fixed by a separate contract and thereafter incorporated into the franchise by amendment effective to March 1, 1939. The several franchises have from nine years upwards yet to run; and all the incidental rate contracts were entered into before the Act.

Section 164 of the Kentucky Constitution has been construed in numerous decisions of the Court of Appeals of Kentucky³ as vesting in a municipality "specific authority"

³ *Moberly v. Richmond Telephone Co.* (1907), 126 Ky. 369, 103 S. W. 714; *Louisville Home Telephone Co. v. City of Louisville* (1908), 130 Ky. 611, 113 S. W. 855; *City of Louisville v. Louisville Home Telephone Co.* (1912), 149 Ky. 234, 148 S. W. 13; *Lutes v. Fayette Home Telephone Co.* (1913), 155 Ky. 555, 160 S. W. 179; *Bastin Telephone Co. v. Mount* (1917), 176 Ky. 26, 195 S. W. 112; *S. R. Schaff & Co. Inc. v. City of LaGrange* (1917), 176 Ky. 548, 195 S. W. 1097; *Irvine Toll Bridge Co. v. Estill County* (1925), 210 Ky. 170, 275 S. W. 634; *City of Ludlow v. Union Light, Heat & Power Co.* (1929), 231 Ky. 815, 22 S. W. (2d) 909; *Campbellsville v. Taylor County Telephone Co.* (1929), 229 Ky. 1843,

(*Home Telephone & Telegraph Co. v. Los Angeles* (1908), 211 U. S. 265, 273, 53 L. Ed. 176, 182) to enter into a contract with a utility, in reference to a franchise, fixing rates, thereby suspending the rate making power during the term of the contract under the contract clause of the United States Constitution (*St. Cloud Public Service Co. v. St. Cloud* (1924), 265 U. S. 352, 68 L. Ed. 1050; *Railroad Commission v. Los Angeles Railway Corp.* (1929), 280 U. S. 145, 74 L. Ed. 234). In such circumstances, any reduction in any of the plaintiff's wholesale prices would not be in the public interest but for the private benefit of the distributing purchaser thereby depriving the appellant of its property contrary to the due process clause of the Fourteenth Amendment to the United States Constitution (*Thompson v. Consolidated Gas Utilities Corp.* (1937), 300 U. S. 55, 81 L. Ed. 270).

Respectfully submitted,

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18 S. W. (2d) 305; *Kentucky Utilities Co. v. City of Paris* (1931), 237 Ky. 488, 35 S. W. (2d) 873, and *Central Kentucky Natural Gas Co. v. City of Lexington* (1935), 260 Ky. 361, 85 S. W. (2d) 870. Compare: *Paducah v. Paducah Railway Co.* (1923), 261 U. S. 267, 67 L. Ed. 647; *Union Light, Heat & Power Co. v. Railroad Commission* (E. D. Ky.—1926), 17 F. (2d) 143, and *Wright v. Central Kentucky Natural Gas Co.* (1936), 297 U. S. 539, 80 L. Ed. 850.

OPINION—Filed November 6, 1937.

Before HICKS, Circuit Judge, and HAMILTON and FORD,
District Judges.

FORD, *District Judge*:

This is an action in equity filed by Petroleum Exploration, a corporation doing business in Kentucky but organized and existing under the laws of the State of Maine, to enjoin the Public Service Commission of Kentucky from enforcing or attempting to enforce compliance with an order of the Commission, pursuant to which the Commission proposes to inaugurate an investigation of the rates charged by complainant for gas transported by its pipe lines from its gas fields in Eastern Kentucky to the corporate limits of various Kentucky municipalities and there sold and delivered to certain public utility corporations.

The order complained of required the complainant to produce, at a public hearing before the Commission, evidence showing conclusively the fairness and reasonableness of its rates and charges, a complete statement of all contracts and working arrangements with its subsidiary corporations, if any, and to make available, for examination by the Commission's representatives, all its books, accounts, records, correspondence and memoranda.

At the time fixed for the hearing, the complainant appeared and offered a plea challenging the Commission's jurisdiction. The Commission overruled the plea and made an order fixing a later date for the proposed hearing and investigation. Before that time arrived, the complainant filed with the Commission an application for a rehearing on the jurisdictional question, together with an amended and supplemental plea which, on account of the institution of this action, has not been acted upon.

In addition to alleging diversity of citizenship and the value of the matter in controversy, required to sustain federal jurisdiction under section 24 of the Judicial Code (28 U. S. C. A. § 1), the bill further alleges, in substance, that the complainant, in transporting and selling its gas under contract to certain public utility corporations, is engaged

merely in an ordinary private commercial enterprise, that it is not a public utility and is not subject and can not be made subject to the regulatory jurisdiction of the Commission by any law which would be valid under the State or Federal Constitution. It charges that the obvious purpose of the Commission is to attempt, without right or authority of law, to lower some or all of the rates fixed under its existing contracts, and that the order, made with that end in view, is repugnant to the contract clause of the Federal Constitution and is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The case is submitted upon complainant's motion for a temporary injunction to restrain enforcement of the order of the Commission. Permanent injunction is the ultimate relief sought.

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction." *Cruikshank v. Bidwell*, 176 U. S. 73, 80.

In *State Corporation Commission of Kansas et al. v. Wichita Gas Company*, 290 U. S. 561, it was asserted that a certain order of the State Corporation Commission of Kansas, made as a preliminary step toward ascertaining and fixing reasonable rates to be charged by a public utility, was repugnant to the Federal Constitution, and temporary and permanent injunction was sought. The court, in denying injunctive relief, said:

"We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted."

It is further alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission

would be approximately \$25,000 and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this action.

The Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1934 Acts, ch. 145; Kentucky Statutes § 3952b-4) provides "The commission may compel obedience to its lawful orders by mandamus or injunctions or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction", and further (sec. 9), after prescribing penalties to be imposed upon utilities for neglect or refusal to obey "any lawful requirement or order made by the commission", the Act provides: "Whenever any utility is subject to a penalty under this Act, the commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty."

It thus appears that the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission Counsel upon which he may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by en-

forcement of the order against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code §237; 28 U. S. C. A. §344). *Morgan v. Rogers*, 284 U. S. 521, 526.

In *Federal Trade Commission v. Claire Company*, 274 U. S. 160, certain corporations challenged the constitutional validity of orders of the Federal Trade Commission requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information relating to the business in which the complainant corporations were engaged, and sought by injunction to restrain the Commission from enforcing or attempting to enforce the challenged orders. The Court said:

"There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

* * * Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction."

Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may

passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever. *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276.

Equity jurisdiction to grant injunctive relief should be exercised only where "in a case reasonably free from doubt" it is shown that "intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney, et al*, 248 U. S. 453, 456.

The defendant filed an answer to the bill on the merits without raising the question as to equity jurisdiction. It is pointed out, however, in *Federal Trade Commission v. Claire Company*, supra, that acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, sua sponte. *Twist v. Prairie Oil Company*, 274 U. S. 684, 690; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied.

By stipulation the case having also been submitted for final determination, the application for a permanent injunction should be likewise denied, and the bill dismissed for want of equity. □

Judge HAMILTON, dissenting in part:

I agree with the conclusion of the majority opinion because the Act of May 14, 1934, Chapter 283, Section 1, 48 Stat. 775, U. S. C. A. Title 28, Section 41(1), withdraws from the jurisdiction of the District Courts of the United States suits enjoining the execution of orders of administrative boards or commissions where the laws of the State provide a plain, speedy and efficient remedy for a judicial review.

The laws of the Commonwealth of Kentucky provide for an adequate judicial review of the orders and findings of its Public Service Commission. (Carroll's Kentucky Statutes, 1936 Edition, Sections 3952-1 to 3952-61.) The plaintiff alleges in its petition that it does not come within the term "utility or utilities" as defined under Carroll's Kentucky Statutes, 1936 Edition, Section 3952-1, and for that reason this case does not fall within the bar of the Act of May 14, 1934; but I am of the opinion that this Act, being remedial in its nature, should be liberally construed in order that the Courts of the States may be left free to interpret their own statutes. It may be said, however, that the Public Utilities Act of the Commonwealth of Kentucky includes within its terms all persons, corporations, their lessees, trustees or receivers, producing, manufacturing, storing, distributing or selling natural or artificial gas for public consumption. The Act of May 14, 1934, cannot be avoided so as to confer jurisdiction on this Court by a naked allegation of the plaintiff that it is not one of the persons coming within the statutory law of the Commonwealth of Kentucky regulating public utilities.

The Commission, in its order, which the plaintiff seeks to enjoin in this action, found that the plaintiff was a public utility and had authority to fix its rates. The language of the Act (48 Stat. 775) expressly prohibits District Courts from enjoining any order of a State rate-making body.

Lower Federal Courts are creatures of the Congress, and their powers are confined within the Acts bringing them into existence, and whatever may be their inherent power incident to jurisdiction, the Congress can take from them the authority to grant injunctions in rate making cases and confer such power on the Courts of the State, even though a Federal constitutional right is involved. *Ex Parte Robinson*, 19 Wall. 505; *Bessette v. Conkey Company*, 194 U. S. 324; *Michaelson v. United States*, 266 U. S. 42, 66; *Gillis, Receiver, v. California*, 293 U. S. 62, 67.

If the majority opinion be correct, the Act of May 14, 1934, was wholly unnecessary, because in no event would the Federal Court enjoin the orders of a public utility rate making body if the State law provided an adequate judicial review.

The case of *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561, 570, relied on in the opinion of the majority, has no application to the case at bar. In the cited case, the Commission sought to compel certain pipe line companies to disclose to it facts to be used in fixing the rates of the distributing companies. The order of the Commission sought to be enjoined did not fix rates, nor was it contended as a basis for relief that the Commission was without authority to inquire into the charges of the Wichita Company. The Court said:

"The Commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 452, et seq. But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & Mackinac Ry. v. Mich. R. R. Comm'n.*, 235 U. S. 402, 405. *Napa Valley Co. v. R. R. Comm'n.*, 251 U. S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas Court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon v. Rutland R. Co.*, 232 U. S. 134, 138. *Missouri v. Chicago, B. & Q. R. Co.*, 241 U. S. 533, 542. *Ex parte Young*, 209 U. S. 123, 166. And upon the issue or confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 289. *Bluefield Co. v. Pub. Serv. Comm'n.*, 262 U. S. 679, 689. *United Railways v. West*, 280 U. S. 234, 251."

The plaintiff's suit here is based solely on the ground that the laws of the Commonwealth of Kentucky do not make it subject to the jurisdiction of the Public Service Commission for any purpose. It therefore follows that if plaintiff's contention be sound, it does not have to await the outcome of administrative action before resort to the Courts to determine its rights. The question in dispute is purely a legal one and is not affected to administrative decision. *Gulf v. Interstate Natural Gas Company*, 82 F. (2) 145, 150.

Federal Trade Commission v. Claire, 274 U. S. 160, 174, does not lend support to the conclusion of the majority. In that case, the Claire Company sought to enjoin an order of the Federal Trade Commission requiring it to submit reports concerning its business, under Section 6 of the Act creating it. The Commission's orders were enforceable only by requesting the Attorney General to institute mandamus proceedings against the recalcitrant, or by supplying him with facts necessary to enforce forfeitures. Any proceeding to compel compliance or to recover forfeitures could only be had in the United States District Court on the law side of the docket. The Court refused to grant equitable relief on the ground it had adequate remedy at law in the Federal Courts by presenting its defense to the mandatory or penalty action when instituted.

I have always understood the rule to be that the adequate remedy at law which defeats equitable jurisdiction must be such remedy in the Federal Courts, and not in the State Courts, and it must be a remedy which the Federal Courts can administer under the circumstances of the particular case, and any doubt as to the law remedy must be resolved in favor of the equitable.

The Courts have universally held that Federal Equity jurisdiction is to be tested by those rules, principles and usages as administered by the Federal Courts immediately after the adoption of the Constitution, unaffected by State statutes or practices, regardless of the antiquity of the remedy at law in the State Courts. In other words, a case cognizable by a Federal Court of Equity for inadequacy of legal remedy is still such a case regardless of State legis-

lation or practice enlarging legal remedies, and continues thus until the Congress deprives the Federal Courts of jurisdiction.

The majority opinion, without stated legal justification, and misapplying the *Claire* case, relegates the plaintiff for relief to the Franklin Circuit Court of the Commonwealth of Kentucky, because of the provisions of the Kentucky Statutes, 1936 Edition, Sec. 3952-44.

In the case of *Smyth v. Ames*, 169 U. S. 466, 550, the Court said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

When the violator is an individual the penalties for failure to comply with the orders of the Public Service Commission are not more than \$1,000.00, or confinement in jail for not more than six months, or both, and if a corporation, not less than \$25.00 or more than \$1,000.00 for each violation, the enforcement thereof to be by the Franklin Circuit Court of the Commonwealth of Kentucky.

In the case of *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 167, the Court, quoting from *Ex parte Young*, 209 U. S. 123, 155, said:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional

act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

The case of New Hampshire Gas & Electric Company *v. Morse*, 42 F. (2) 490, 495, is directly in point. In that case the Court said:

"It is not reasonable to hold that a person must violate a law and subject himself to possible fines or imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 30 S. Ct. 286, 54 L. Ed. 430."

Compare also: *Risty v. Chicago, R. I. & Pacific Railway Company*, 270 U. S. 378, 390; *City of Fort Worth v. Southwestern Bell Telephone Company*, 80 F. (2) 972; *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 74; *Grandin Farmers Cooperative Elevator Company v. Langer*, 5 F. Supp. 425, affirmed 292 U. S. 605; *City of Commerce v. Southern Railway Company*, 35 F. (2d) 331; *Los Angeles Railway Company v. Railroad Commission of California*, 29 F. (2) 140.

For the reasons herein stated, I find myself unable to agree with the majority opinion.

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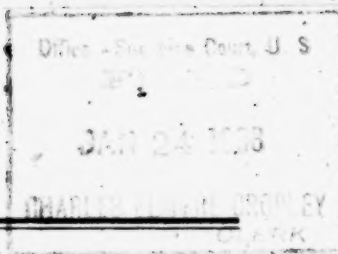
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FILE COPY



Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a
Kentucky Body Corporate, J. C. W. BECKHAM,
THOS. C. McGREGOR and JAMES W.
CAMMACK, Appellees.

Appeal From the District Court of the United States for
the Eastern District of Kentucky.

APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL AND STATEMENT OF FACTS AND ACCOMPANYING BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a
Kentucky Body Corporate, J. C. W. BECKHAM,
THOS. C. MCGREGOR and JAMES W.
CAMMACK, Appellees.

Appeal From the District Court of the United States for
the Eastern District of Kentucky.

**APPELLANT'S MOTION FOR INJUNCTIVE RELIEF
PENDING APPEAL AND STATEMENT OF
FACTS AND ACCOMPANYING BRIEF
IN SUPPORT THEREOF.**

MOTION.

Comes now the above-named appellant by its counsel and moves, for reasons hereinafter set forth, that, pending the disposition of this cause in this Court, the above-named appellees be enjoined from further prosecuting against the appellant their attempted investigation, being their Case No. 396, severally in respect of the price for gas fixed by each of the appellant's con-

tracts for the sale thereof, as mentioned, set forth and prayed for (Tr., pp. 29-30) in its bill of complaint, and the exhibits therewith, that is to say,

(a) Appellant's contract with Central Kentucky Natural Gas Company, for the sale of gas at Lexington, Kentucky, Exhibit B, (Tr., pp. 3, 32).

(b) Appellant's contract with D. L. Johnson, for the sale of gas at Irvine and Richmond, Kentucky, Exhibit C with the bill of complaint (Tr., pp. 3-4, 33).

(c) Appellant's contracts with Peoples Gas Company of Kentucky, for the sale of gas at Barbourville, Kentucky, Exhibits D and E (Tr., pp. 4, 33-4).

(d) Appellant's contracts with said last named company for the sale of gas at Corbin, Kentucky, Exhibits F, G and H (Tr., pp. 4-5, 34-5).

(e) Appellant's contracts with the last named company, for the sale of gas at Manchester, Kentucky, Exhibits I and J (Tr., pp. 5, 35).

(f) Appellant's contract with the last mentioned company, for the sale of gas at Somerset, Kentucky, Exhibit K (Tr., pp. 6, 36).

(g) Appellant's contract with P. P. Edwards and R. C. Eversole, partners as Edwards & Eversole Gas Company, for the sale of gas at London, Kentucky, Exhibit L (Tr., pp. 6, 36).

Or, in the alternative, the appellant so moves that the restraining order granted by the court below (by its decree of July 28, 1937, and by agreement of the parties continued in effect until final decision below upon the merits, by decree below entered August 7, 1937, and dissolved by final decree below entered January 6, 1938, the effect whereof, however, was stayed for a period of thirty days from that date to give the appellant an opportunity to perfect its appeal in this Court) be continued in effect pending the disposition of this cause in this Court; or for such injunctive relief as may other-

wise be proper. The decrees mentioned are printed in the appendix hereto. Since the record has not been printed references are to the transcript.

STATEMENT OF FACTS.

The appellant, Petroleum Exploration, is a Maine corporation, engaged *inter alia* in the production of natural gas from private lands in Owsley, Jackson, Clay and Knox counties, Kentucky, and its transmission intrastate through pipe lines across other private lands (pursuant in both cases to appropriate grants from the land-owners) to the corporate limits of the municipalities of Lexington, Richmond, Irvine, London, Manchester, Somerset, Barbourville and Corbin, at each of which the gas is sold and delivered in bulk (pursuant to formal written contract stating price, quantity and other terms and provisions) to the local utility which distributes it to the public in the municipality. (Tr., pp. 2-7, 9, 11, 13, 14, 15, 61-6, 67, 68, 69, 70, 72, 73, 74, 110-13). There is no affiliation between the appellant and the distributing utility at each of Lexington, Richmond, Irvine and London; and the several contracts for deliveries thereat were negotiated at arm's length. (Tr., pp. 16, 75, 89-92, 110-11). The distributing utility (Peoples Gas Company of Kentucky) at each of the remaining municipalities, that is, Manchester, Somerset, Barbourville and Corbin, is a subsidiary of the appellant by virtue of its 25/32nds stock ownership therein. (Tr., pp. 15-6, 74-5, 92, 112).

The contracts provide for the delivery in the aggregate of approximately a billion feet of gas annually at an aggregate price of approximately \$350,000.00 and have from nine years upward to run. (Tr., pp. 32-36, 114). All of the contracts were entered into before the

Kentucky Utilities Act (Kentucky Acts of 1934, c. 145, effective June 14, 1934, as amended by such Acts of 1936, c. 92, effective May 16, 1936, appearing as secs. 3952-1 to 3952-61, inclusive, of Carroll's Kentucky Statutes, Annotated, Baldwin's 1936 Revision, hereinafter abbreviated "Ky. Stat.", pertinent sections from which are printed in the appendix).

The distribution of gas in each of the municipalities is made pursuant to a franchise for the purpose granted to the utility by the municipality by authority of secs. 163 and 164 of the Constitution of Kentucky; and as authorized by those sections the distribution rates for gas in each municipality were fixed by contract, in reference to the franchise, entered into between the municipality and the local utility, prior to the enactment of the Utilities Act. (Tr., pp. 7-15, 37-56, 66-74, 113). Sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27) expressly undertakes to authorize the Public Service Commission of Kentucky thereby created (sec. 2(a); Ky. Stat. 3952-2) to change the rates so fixed.

On May 29, 1937, the Commission entered an order on its own motion finding the appellant to be a wholesaler of gas and a "utility" as defined in the Utilities Act; initiating an investigation of the appellant's wholesale gas prices; setting a public hearing for June 29, 1937; and citing the appellant to appear "and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable". (Tr., pp. 19-22, 78-9, 113).

The appellant, conceiving its wholesale prices to be not subject to the rate regulatory power of the Commission, appeared on the day mentioned and offered its objections to the Commission's authority in that behalf, in the nature of a plea to its jurisdiction. The plea was summarily overruled and another order entered by the Commission on or as of that day again finding the appellant to be a "utility" as defined in the Utilities Act and setting the investigation for further hearing on July 29, 1937. (Tr., pp. 22-4, 90-1, 113-4). These orders are printed in the appendix. Within twenty days as provided by sec. 6(d) of the Utilities Act (Ky. Stat. 3952-36) the appellant filed with the Commission its application for rehearing and amended and supplemental objections to its jurisdiction. (Tr., pp. 24-5, 81, 114). The objections set forth are the same as those alleged in the bill of complaint. (Tr., p. 57). The findings of the Commission were not based upon any evidence adduced before it but "on general information of the members of the Commission". (Tr., pp. 28, 85, 114). The Commission intended and threatened to proceed with its investigation without ruling upon the application for rehearing and the amended and supplemental objections. (Tr., pp. 25, 81, 114).

The Commission has not commenced proceedings to reduce the rates of the distributing utilities, but proposes to pass on to the public any reduction in the appellant's wholesale prices by "other and subsequent regulatory action" so the answer avers. (Tr., p. 83).

On July 24, 1937 (Tr., p. 1), the appellant filed its bill of complaint and exhibits and gave notice of an application for a restraining order. The bill (Tr., pp. 1-31) attacks the Commission's authority to regulate the appellant's wholesale prices for gas and sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27) under the due process,

equal protection and contract clauses of the United States Constitution; and prays for an injunction against the investigation severally in respect of the price for gas fixed by each of the appellant's wholesale contracts. No obstacle is sought to be interposed to the Commission's obtaining such information as it may desire, either by appellant's disclosure or inspection of its books and records. (Tr., pp. 28-30).

On July 28, 1937, a restraining order was granted and a three-judge court ordered convened as provided in sec. 266 of the Judicial Code (U. S. C. Tit. 28, sec. 380).

The defendant Commission and its members answered admitting the nature and character of the appellant's gas business as above set forth. See references *ante*. The only substantial issues of fact tendered by the answer were in professing no knowledge of the non-affiliation of the appellant and the distributing utilities at Lexington, Richmond, Irvine and London, (Tr., p. 75); and the cost to the appellant of complying with the Commission's order of May 29, 1937, which the bill alleged would be \$25,000.00 (Tr., p. 27), which the answer denied generally (Tr., p. 85), and which the court found to exceed \$3,000.00, exclusive of attorneys' fees. (Tr., p. 114).

The cause came on to be heard on August 7, 1937, upon appellant's motion for an interlocutory injunction and, by agreement of the parties, for final decree upon the merits; and by like agreement the restraining order was continued in effect until final decision. (Tr., pp. 87-9). Testimony was taken on behalf of the appellants from which it appears that its several contracts for gas deliveries at Lexington, Richmond, Irvine and London were entered into with non-affiliates at arm's length and that there is no affiliation between the appellant and the distributing utility in any of those cities (and the court

so found, Tr., pp. 111-2); also that to comply with the Commission's order* would cost from \$21,500.00 upward, exclusive of attorney fees. (Tr., pp. 89-95). Sec. 4(f) of the Utilities Act (Ky. Stat. 3952-19) requires among other things the consideration of "reproduction as a going concern" as an element of valuation.

By final decree of January 6, 1937, for reasons set forth in the majority and dissenting opinions (Tr., pp. 99-109), printed in the appendix, but not yet reported, an interlocutory and permanent injunction were denied, the bill dismissed, the restraining order dissolved, and appellant's petition under Equity Rule 74 for an injunction pending appeal denied; but the decree in respect of such dissolution was stayed for thirty-days to permit the appellant an opportunity to perfect its appeal in this Court. (Tr., pp. 117-8).

The majority (Circuit Judge Hicks and District Judge Ford) held that, assuming but not deciding the appellant's constitutional objections to be well founded, it could stand by until the Commission had completed its investigation and entered its final determination and sought to enforce the same by mandamus under sec. 4(b) of the Utilities Act (Ky. Stat. 3952-13) or for the recovery of penalties under sec. 9 thereof (Ky. Stat. 3952-61) and then assert such objections by way of defense, with the ultimate right of appeal to this Court after exhausting its defense in the state courts, which ousted the federal equitable jurisdiction. The minority (District Judge Hamilton) filed a dissent, wherein he disagreed with the position of the majority but agreed in the result because, so he held, the appellant's cause had been removed from the realm of the jurisdiction of a United States district court by the Johnson Act (Act of Congress of May 14, 1934, c. 283, sec. 1, 48 Stat. 775, amendatory of sec. 24 of the Judicial Code, U. S. C. Tit.

28 sec. 41 (1)), which he further held was remedial and hence should be liberally construed. The majority opinion does not mention the Johnson Act. The appellees made no question in the court below of its jurisdiction.

The price of appellant's standing by until the Commission has completed its investigation and made its final determination is (1) to permit the Commission to fix the appellant's wholesale contract gas prices upon the Commission's own *ex parte* evidence; (2) to sacrifice the appellant's right to judicial review of the Commission's determination, which must under sec. 7(a) of the Utilities Act (Ky. Stat. 3952-44) be commenced within twenty days; and (3) to expose the appellant and its officers, agents and employees to fines, penalties and punishment under sec. 9 of the Utilities Act (Ky. Stat. 3952-61).

The alternative is the expenditure of many thousand dollars in complying with the Commission's order of investigation in the manner prescribed by the Utilities Act, especially sec. 4(f) thereof (Ky. Stat. 3952-19) respecting the ascertainment of the rate base. If it should then turn out that the price-regulatory investigation and the statute complained of are not constitutional, the loss of such expenditure would be irreparable.

BRIEF.

The production of natural gas and its transmission from and across private lands, pursuant in each case to appropriate grants from the several land owners, and its sale in bulk at arm's length by long term contracts to non-affiliated distributing utilities is a private enterprise not affected with a public interest and not subject to price regulation. Compare *United States v. Uncle Sam Oil Co.* (of the Pipe Line Cases), 234 U. S. 548, 561-2, 58 L. ed. 1459; *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 126-7, 76 L. ed. 655; *Thompson v. Consolidated Gas Utilities Co.*, 300 U. S. 58, 78-9, 81 L. ed. 510; *Natural Gas Pipeline Co. v. Slatery*, 82 L. ed. (Adv. Ops.) 205, 208; *Nowata County Gas Co. v. Henry Oil Co.*, (8th C. C. A.), 269 Fed. 742, 745-7; *Puget Sound International Ry. & P. Co. v. Kuykendall* (W. D. Wash.), 293 Fed. 791, 793-4; *Texoma Natural Gas Co. v. Railroad Commission* (W. D. Tex.), 59 Fed. (2d) 750, 752-3; and *Pennsylvania R. Co. v. Pittsburgh L. & W. R. Co.*, (6th C. C. A.), 83 Fed. (2d) 861, cert. den. 299 U. S. 572, 81 L. ed. 421.

Like production and transmission, but sale to a subsidiary distributor, while it may be affected with a public interest, is not subject as to price to direct regulation by the rate-making body, whatever may be the authority of that body to regulate the distribution rates of the subsidiary, and to make reasonable allowance only as an operating expense for gas so purchased; the revenues derived by the subsidiary from the public may be divided with the parent company as they may agree, for which the rate-making body cannot substitute its judgment. Compare *Western Distributing Co. v. Public Service Commission*, *supra*, 123-5; and *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 320-1, 73 L. ed. 390.

That the appellant's wholesaling gas to its subsidiary may be affected with a public interest does not so affect its wholesaling to non-affiliates. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 256, 60 L. ed. 984; *Puget Sound International Ry. & P. Co. v. Kuykendall* (W. D. Wash.), *supra*, 793; *Chenery v. Employers' Liability Assur. Corp.* (9th C. C. A.), 4 Fed. (2d) 826, 827; and *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249.

Secs. 163 and 164 of the Kentucky Constitution are:

"§163. *Streets not to be taken by private corporation without consent; exception.* No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

"§164. *Franchise or privilege not to be granted for longer than twenty years; sale of; exception.* No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to

reject any or all bids. This section shall not apply to a trunk railway." (*Italics supplied*).

These sections have been construed by the highest court of Kentucky, the Court of Appeals, to be, to use its own language (*Irvine Toll Bridge Co. v. Estill County*, 210 Ky. 170, 275 S. W. 634, 636, 637) "self-operative" and to "delegate" to a municipality authority to grant a franchise to a utility; and, in reference thereto, to enter into a contract with the utility fixing rates. Compare, among the numerous decisions, *Moberly v. Richmond Telephone Co.* (1907), 126 Ky. 369, 103 S. W. 714; *Louisville Home Telephone Co. v. City of Louisville* (1908), 130 Ky. 611, 113 S. W. 855, 861; *City of Louisville v. Louisville Home Telephone Co.* (1912), 149 Ky. 234, 148 S. W. 13, 15, 16; *Lutes v. Fayette Home Telephone Co.* (1913), 155 Ky. 555, 160 S. W. 179, 183; *Bastin Telephone Co. v. Mount* (1917), 176 Ky. 26, 195 S. W. 112, 113; *S. R. Schaff & Co. Inc. v. City of La Grange* (1917), 176 Ky. 548, 195 S. W. 1097, 1099; *Campbellsville v. Taylor County Telephone Co.* (1929), 229 Ky. 1843, 18 S. W. (2d) 305, 308; *City of Ludlow v. Union Light, Heat & Power Co.* (1929), 231 Ky. 815, 22 S. W. (2d) 909, 911; *Kentucky Utilities Co. v. City of Paris* (1931), 237 Ky. 488, 35 S. W. (2d) 873, 874; and *Central Kentucky Natural Gas Co. v. City of Lexington* (1935), 260 Ky. 361, 85 S. W. (2d) 870, 872, 873; also *Paducah v. Paducah Railway Co.* (1923), 261 U. S. 267, 272-3, 67 L. ed. 647; *Wright v. Central Kentucky Natural Gas Co.* (1936), 297 U. S. 539, 542, 80 L. ed. 850; and *Union Light, Heat & Power Co. v. Railroad Commission* (E. D. Ky.—1926), 17 Fed. (2d) 143, 148.

It is implicit in sec. 164 that a municipality has authority to make a contract in reference to a franchise; and the Kentucky Court of Appeals in the cases cited and others has held that rates are an appropriate sub-

ject of such a contract. That is "specific authority". Compare *Home Telegraph & Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176; and *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352, 359-60, 68 L. ed. 1050.

Recently, June 20, 1936, upon review by a single Justice of the Court of Appeals of an order overruling a motion to dissolve a temporary injunction, as permitted by the Kentucky practice, the Justice, in his opinion, discussed the constitutionality of sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27), by way of *obiter dicta*. No rate contract was involved, the ordinance enjoined having sought to reduce a telephone utility's rates without its consent. *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 265 Ky. 286, 96 S. W. (2d) 695. Other Justices who sat at the hearing concurred in the view that the motion to dissolve should be overruled but not apparently in the *obiter dicta* expressed in the opinion (96 S. W. (2d) 698). In addition to lacking the quality of *stare decisis* such a decision under compulsion of statute could not impair the obligation of a contract. Compare *Los Angeles v. Los Angeles Water Co.*, 176 U. S. 558, 575, headnote 2, 44 L. ed. 886; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 452-3, 68 L. ed. 382; and *Peoples Banking Co. v. Sterling*, 300 U. S. 175, 182-3, headnote 2, 81 L. ed. 586.

A rate contract pursuant to specific authority is within the protection of the contract clause of the United States Constitution and suspends during the term thereof the rate-making power. Compare *Los Angeles v. Los Angeles City Water Co.*, *supra*; *Detroit v. Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 384, 46 L. ed. 593; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 515-6, 51 L. ed. 1155; *St. Cloud Public*

Service Co. v. St. Cloud, supra; and *Railroad Commission v. Los Angeles Railway Corp.*, 280 U. S. 145, 74 L. ed. 234.

To reduce the appellant's wholesale prices for the benefit of the distributing utilities deprives it of its property without due process of law. Compare *Thompson v. Consolidated Gas Utilities Corp.*, *supra*, 79-80.

Injunction is an apt remedy to prevent an unconstitutional attempt to regulate one's business and affairs. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984; *Packard v. Banton*, 264 U. S. 140, 143, 68 L. ed. 596; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445; *Tyson & Bro. (United Theatre Ticket Offices) v. Banton*, 273 U. S. 418, 427-8, 71 L. ed. 718; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239, 73 L. ed. 287; and *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 59.

The appellant is not obliged to take the risk of prosecution, fines and penalties, of the imprisonment of its officers, agents and employees, or of the loss of its property in order to test the constitutionality of the attempted price-regulatory investigation and statute, rather than resort to the equitable remedy of injunction. Compare *Truax v. Raich*, 239 U. S. 33, 37-9, 60 L. ed. 131; *Pennsylvania v. West Virginia*, 262 U. S. 553, 592-3, 67 L. ed. 1117; *Terrace v. Thompson*, 263 U. S. 197, 215-6; 68 L. ed. 255; *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 386, 71 L. ed. 303; *Swift & Co. v. United States*, 276 U. S. 311, 326, 72 L. ed. 587; *City Bank Farmers Trust Co. v. Schnader*, 291 U. S. 24, 34, 78 L. ed. 628; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 414, 79 L. ed. 446; and *Carter v. Carter Coal Co.*, 298 U. S. 238, 287-8, 80 L. ed. 1160.

The test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy at law in such court, and not the presence or absence of such a remedy in a state court. Compare *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819; *Chicago, B. & Q. Railroad Co. v. Osborne*, 265 U. S. 14, 16, 68 L. ed. 878; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388 70 L. ed. 641; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 126-7, 74 L. ed. 737; *City Bank Farmers Trust Co. v. Schnader*, *supra*, 29; and *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69, 80 L. ed. 47, 51.

"Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659. Compare *Railroad & Warehouse Commission v. Duluth Street Ry. Co.*, 273 U. S. 625, 628, 71 L. ed. 807.

The Johnson Act is:

"* * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a *public utility*, (2) does not interfere with interstate commerce, and (3) has been made after *reasonable notice and hearing*, and where a *plain, speedy and efficient remedy* may be had at law or in equity in the courts of such State. * * *." (Italics supplied).

The appellant's wholesale contract gas prices are not "rates". Compare *State v. Spokane & Inland Empire Railroad Co.*, 90 Wash. 599, 154, Pac. 1110, L. R. A. 1918C, 675, 680.

The appellant's status in respect of its sales to non-affiliates under arm's length contracts as a utility *vel non* is a judicial and not a legislative question. Compare *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 536-7, 67 L. ed. 1103; *Michigan Public Utilities Commission v. Duke*, *supra*, 577-8; *Tyson & Bro. v. Banton*, *supra*; also *Cincinnati v. Vester*, 281 U. S. 439, 446, 74 L. ed. 950. The Johnson Act assumes that a complainant is a "public utility". While the Commission, being a legislative body, is without jurisdiction to pass on judicial questions, the matter of its lack of authority to regulate appellant's wholesale prices was urged before it out of courtesy and an abundance of precaution.

To have to drag through a price-fixing investigation in order to determine the question of appellant's being subject thereto is not a "plain, speedy and efficient remedy" to try that question; yet it is extremely doubtful if anything other than a final determination or order of the Commission is reviewable under sec. 7(a) of the Utilities Act (Ky. Stat. 3952-44), or otherwise in the state courts. See *Smith v. Southern Bell Telephone & Telegraph Co.*, 261 Ky. 421, 104 S. W. 961, 963-4. If a remedy in the state courts be doubtful, the Johnson Act is inapplicable. Compare *Corporation Commission v. Carey*, 296 U. S. 452, 457-8, 80 L. ed. 324; and *Mountain States Power Co. v. Public Service Commission*, 299 U. S. 167, 169-70, 81 L. ed. 99.

The Commission's orders finding the appellant to be a "utility" within the meaning of the Utilities Act, not based upon any evidence adduced before the Com-

mission but "on general information of the members of said Commission", were not "made after reasonable notice and hearing". Compare *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93-4, 57 L. ed. 431; *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, 265-6, 68 L. ed. 667; *Northern Pacific Railroad Co. v. Department of Public Works*, 268 U. S. 39, 44-5, 69 L. ed. 826; and *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 71, 79 L. ed. 761.

While a valid exercise of legislative policy, the Johnson Act can scarcely be said to supply a defect or abridge a superfluity in the common law, which is, according to Blackstone, the object of remedial legislation. Compare 1 *Bl. Com.* 86-7.

The General Assembly of Kentucky, by its definition of a "utility" in sec. 1 of the Utilities Act (Ky. Stat. 3952-1), could not convert a private enterprise into a public utility. Compare *Michigan Public Utilities Commission v. Duke*, *supra*, 577-8, 69 L. ed. 445; *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101; and *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264. If the appellees contend for an unconstitutional construction, they do so at their peril. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 74-6.

Inasmuch as opposition is offered only to the Commission's authority to regulate appellant's wholesale gas prices, and not to the Commission's having whatever information it desires, the instant cause in that respect is unlike *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, 569, 78 L. ed. 500; or *Natural Gas Pipe Line Co. v. Slattery*, *supra*; also *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 71 L. ed. 978.

To suspend the investigation, insofar as the Commission seeks thereby to regulate the appellant's wholesale prices, pending this appeal, would not harm the public which can receive no benefit until the Commission reduces the distribution rates, which it has made no effort to do, and which it is powerless to do, the franchise rate contracts being inviolate. The first of such contracts to expire is that for Lexington on March 1, 1939 (Tr., pp. 38-9, 42); the others have several years yet to run (Tr., pp. 45, 46, 48, 49, 50, 50-1, 52, 54, 55, 56).

Wherefore, the foregoing motion, statement of facts and brief are respectfully submitted.

EDWARD C. O'REAR of
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CHAS. N. KIMBALL of
Sistersville, West Virginia,
Counsel for Petroleum Exploration.

APPENDIX.

Kentucky Utilities Act.

§1. (Ky. Stat. 3952-1) *Definitions.*

(a) The term "corporation", when used in this act, includes private, *quasi* public and public corporations, an association, a joint stock association, or a business trust.

(b) The term "person", when used in this act, includes a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "utility" or "utilities", when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter own control, operate or manage (one) any facility used or to be used for or in connection with the generation, production, transmission or distribution of electricity to or for the public for compensation for lights, heat, power or other uses; (two) any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; (four) any facility used or to be used for or in connection with the diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation; (five) any facility used or to be used for or in connection with the transmission or conveyance over wire, in the air or otherwise, of any message either by telephone or telegraph for the public for compensation; (six) any facility used or to be used for or in connec-

tion with the transportation of persons or property by street, suburban or interurban railways for the public for compensation: Provided, however, that for the purposes of this act the term "utility" or "utilities" shall not mean or include any city or town or water districts established in pursuance of Chapter one hundred thirty-nine (139).

(d) The term "facility" or "facilities" when used in this Act, shall be construed in its broadest and most inclusive sense and shall include all property, real, personal, tangible and intangible, and all other means and instrumentalities in any manner, owned, operated, leased, licensed, or used, furnished or supplied for, by, or in connection with the business of any utility.

(e) The term "rate", when used in this Act, shall mean and include the plural number as well as the singular, and every individual or joint rate, fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, fare, toll, ~~charge or~~ other compensation, and any schedule or tariff, or part of a schedule or tariff thereof.

(f) The term "service", when used in this Act, is used in its broadest and most inclusive sense, and includes every practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units, the pressure of gas; the purity, pressure and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility.

(g) The term "commission", when used in this Act, shall refer to and mean the Public Service Commission of Kentucky, unless otherwise indicated.

(h) The term "commissioner", when used in this Act, shall mean one of the members of the commission.

§2. *Public Service Commission Created.*

(a). (Ky. Stat. 3952-2) For the purpose of regulating certain utilities and of carrying out the provisions of this act, an administrative body or commission is hereby established, to be known as the "Public Service Commission of Kentucky", which is hereby declared to be a body corporate with power to sue and be sued, and in its corporate name, as above designated, to adopt a corporate seal bearing the following inscription: "Public Service Commission of Kentucky", which seal shall be affixed to all writs and official documents, and to such other instruments as the commission may direct. All courts shall take judicial note of said seal.

§3. *Officers and Employees.*

§4. *Powers and Duties of the Commission.*

(a) (Ky. Stat. 3952-12) *Jurisdiction.* The jurisdiction of the commission shall extend to all utilities in this commonwealth as enumerated in Section 1 of this act.

(b) (Ky. Stat. 3952-13) *General Powers of the Commission.* The commission is hereby given power to investigate all methods and practices of such utilities to require them to conform to the laws of this commonwealth, and to all reasonable rules, regulations, and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications and schedules in effect and used by such utilities to be filed with the commission, and also other information desired by the commission relating to any investigation or requirement. Provided, however, that the Commission shall have no jurisdiction over rates that are now the subject of litigation before the Railroad Commission or

in any court between any utility and any municipality of the State until after the expiration of two (2) years from the entry of final order in said litigation. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, or vacated in whole or in part by order or decree of a court of competent jurisdiction.

(c) *Powers of the Commission with Respect to Rates.*

(1) (Ky. Stat. 3952-14). *Generally.* Whenever the commission after a hearing had upon reasonable notice, upon its own motion or upon complaint, as provided in Section 6 (a) of this act, finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commission shall by order require just and reasonable rates, joint rates, fares, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act.

* * * * *

(f) (Ky. Stat. 3952-19) *Valuation.* The commission may on hearing, after reasonable notice, ascertain and fix the value of the whole or any part of the property of any utility in so far as the same is material to the exercise of the jurisdiction of the commission, and make revaluations from time to time and ascertain the

value of all new construction, extensions, and additions to the property of such utility. In arriving at a valuation of property of any utility as provided in this Section, the commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes. Provided, the right of the commission to value and revalue the property of any utility shall not be exercised unless same is necessary or advisable to determine the legality or reasonableness of any rate, service or issuance of any security or securities, and then only after an investigation affecting same has been instituted by the commission or upon complaint or application.

* * * * *

(j) (Ky. Stat. 3952-23) *Records and Reports.* The books, accounts, papers and records of every utility shall be available to the commission for inspection and examination. If said books, accounts, papers and records are not within the state, the commission may by notice and order require the production of same or, at its option, verified copies in lieu thereof, at such time and place as it may designate, so that an examination may be made by the commission. Provided, in the latter instance any expense incurred shall be borne by the utility so ordered. Every utility, when and as required by the commission, shall file with the commission such annual or other reports or information as the commission shall reasonably require. The commission shall prepare and distribute to such utilities blank forms for any information required under this act. All such reports shall be under oath when required by the commission.

* * * * *

(n) (Ky. Stat. 3952-27) *Authority of the Commission to Change Contract Rates.* The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and promulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise, between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules or service standards, shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed, nor any contract or agreement affecting same shall be abrogated or changed until and after a hearing has been had before the commission in the manner prescribed in this act.

Nothing in this section or elsewhere in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.

§5. *Duties and Privileges of Utilities, Subject to the Regulation of the Commission.*

* * * * *

§6. *Procedure.*

* * * * *

(d) (Ky. Stat. 3952-36) *Rehearing.* After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty days after the service of the order upon it, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for

rehearing, and the commission may grant and hold such hearing on said matters. The commission shall either grant or refuse an application for rehearing within twenty days after the filing of same. Failure by the commission to act upon such application within that period shall be deemed a refusal thereof. Notice of such hearing shall be given as required with respect to original hearings. Upon such rehearings any party may offer additional evidence which could not, with reasonable diligence have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate, or affirm its former orders, and make and enter such order as it may be deemed necessary.

* * * * *

§7. *Court Review.*

(a) (Ky. Stat. 3952-44) Any party to a proceeding before the commission, or any utility affected by an order of the commission, may within twenty days after service upon it of the commission's order or from the time when the commission has failed to act within the period prescribed in Section 6 (d), commence an action in the circuit court for Franklin County or any other court of competent jurisdiction against the commission as defendant to vacate or set aside such order or determination on the ground that it is unlawful or unreasonable.

If a petition for rehearing has been made as provided in Section 6 (d) of this act, the right to commence an action against the commission shall be continued for a period of twenty days from the service of the final order in such rehearing upon the party desiring to commence the action.

* * * * *

(g) (Ky. Stat. 3952-50) *Submission of Evidence to Circuit Court.* The case shall be heard and decided by the Circuit Court upon the evidence submitted to the

Commission as shown by the transcript provided for in Subsection (e) of this Section 7. Upon final submission the Circuit Court shall enter a decree either sustaining the order of the Commission or setting aside and vacating same in whole or in part.

(h) (Ky. Stat. 3952-51) *Appeal to the Court of Appeals.* Either party to said action, within sixty days after the entry of the order of judgment of the circuit court, may appeal to the Court of Appeals of Kentucky, and such appeal, upon the filing thereof in the office of the Clerk of the Court of Appeals, shall be docketed and advanced in similar manner as Commonwealth cases.

§8. *Assessment for Maintaining Commission, and How Apportioned.*

(a) (Ky. Stat. 3952-52) For the purpose of maintaining the commission hereby established; including the payment of salaries, traveling expenses, including hotel bills, printing, rent, light, heat, water, telephone, and all other overhead expenses and the expense of regulation and supervision by the commission of the utilities enumerated in Section 1 of this act, said utilities shall within thirty days after the effective date of this act pay to the State Treasurer of the Commonwealth of Kentucky a sum equal to one-twentieth of one per centum of the total value that has been assessed against the property of said utilities for the year ending December 31, 1932. This fund shall be credited to the account of the commission and shall be used to defray the cost of regulation for the year following the effective date of this act.

* * * * *

(b) (Ky. Stat. 3952-53) On or before July first, 1936, and on or before July first of each year thereafter, such expense of maintaining said commission shall be apportioned among and assessed upon said utilities by the commission in proportion to the gross earnings or

receipts of such utilities derived from intrastate business for the next preceding calendar year in which the assessments are made, providing, however, that the total amount so assessed shall not in any year exceed seventy-five thousand (\$75,000.00) dollars. All such fees for the maintenance of the commission shall be paid to the Treasurer of the Commonwealth of Kentucky on or before the first day of July, 1936, and on or before the first day of July of each year thereafter.

(h) (Ky. Stat. 3952-59) Any such utility failing to make payment as herein provided for the maintenance of said commission shall forfeit and pay to the state one thousand (\$1,000.00) dollars, and twenty-five dollars for each day such utility refuses, neglects or fails to make such payment, which forfeiture shall not release such utility from the payment of such assessment.

§9. (Ky. Stat. 3952-61) *Penalties.*

Every officer, agent or employee of any utility as enumerated in Section 1 hereof, or other person who shall willfully violate any provision of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand (\$1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal such utility shall forfeit and pay into the treas-

ury, a sum not less than twenty-five (\$25.00) dollars, nor more than one thousand (\$1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility.

Actions to recover the principal amount due and the penalties under this Act shall be brought in the name of the Commonwealth of Kentucky in the Franklin Circuit Court. Whenever any utility is subject to a penalty under this Act, the Commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty, provided the commission may compromise such action and dismiss the same on such terms as the court will approve. The principal amount due shall be paid into the State Treasury and credited to the Commission's account, but all penalties recovered by the Commonwealth of Kentucky in such action shall be paid into the State Treasury and credited to the general fund.

§10. (Not printed in Ky. Stat.) *Construction of Act.*

All laws or parts of laws in conflict with the provisions of this act are hereby repealed. Each section of this act is hereby declared to be separate and independent of every other section thereof, and, if for any reason any section or provision of this act shall be held to be unconstitutional or invalid, no other section or provision of this act shall be affected thereby, as the remaining parts of the act would have been passed by the General Assembly if such unconstitutional or in-

valid section or provision, if any, had been stricken out before the passage of this act by the General Assembly.

Commission's Orders.

**BEFORE THE PUBLIC SERVICE COMMISSION
OF KENTUCKY**

A meeting of the Public Service Commission was this day held; present: Commissioners Cammack and McGregor.

IN THE MATTER OF INVESTIGATION ON
MOTION OF THE COMMISSION OF THE
RATES, RULES AND PRACTICES OF
THE PETROLEUM EXPLORATION, INC. } Case No. 396

**NOTICE OF INVESTIGATION AND ORDER TO
SHOW CAUSE**

WHEREAS, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

WHEREAS, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

WHEREAS, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

WHEREAS, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond,

Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

WHEREAS, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

NOW, THEREFORE, NOTICE IS HEREBY GIVEN, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

WHEREAS, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

NOW, THEREFORE, IT IS ORDERED:

1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust, association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed classification of such charges showing separately each class of service and the charges therefor and amounts cleared to each account.

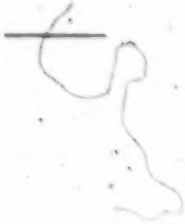
4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

NOTICE IS HEREBY GIVEN to the Petroleum Exploration, Inc., of the above order of the Commission.

Dated at Frankfort, Kentucky, this 29th day of May, 1937.

[SEAL]

CHAS. J. WHITE,
Secretary.



BEFORE THE PUBLIC SERVICE COMMISSION
OF KENTUCKY

A meeting of the Public Service Commission was held on this date; present: Chairman Beckham, Commissioners Cammack and McGregor.

IN THE MATTER OF INVESTIGATION ON
MOTION OF THE COMMISSION OF THE
RATES, RULES AND PRACTICES OF THE
PETROLEUM EXPLORATION, INC. } Case No. 396

ORDER

This cause coming on to be heard on the plea of the Petroleum Exploration, Inc., to the jurisdiction of the Commission and it appearing to the Commission that the Petroleum Exploration, Inc., is engaged in the business of producing, selling and delivering natural gas to various utility companies, which sell and distribute the same to the public in Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthia, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown, all of which towns and all communities are in Kentucky; and it further appearing that the Petroleum Exploration, Inc., owns, controls, operates, and manages facilities used in connection with the production, storage, distribution, sale and furnishing to and for the public for compensation natural gas for light, heat, power, and other purposes and owns and controls facilities used in connection with the transporting and conveying of gas by pipe line to and for the public for compensation; and it further appearing that the Petroleum Exploration, Inc., is a

"utility" under sections 3952-1-12-13-14 of the Kentucky Statutes; and the Commission being advised,

IT IS ORDERED, That the plea to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that the demurrer to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that this action be and hereby it is set down for formal hearing on Thursday, July 29, 1937, at 10:00 A. M., on the notice of investigation and order to show cause issued by the Commission herein on May 29, 1937, to all of which the Petroleum Exploration, Inc., objects and excepts.

This the 29th day of June, 1937.

PUBLIC SERVICE COMMISSION OF KENTUCKY,

J. C. W. BECKHAM,

Chairman.

JAMES W. CAMMACK, JR.,

Commissioner.

THOS. B. MCGREGOR,

Commissioner.

[SEAL]

Attest:

CHAS. J. WHITE,

Secretary.

Decrees in the Court Below.

ORDER GRANTING TEMPORARY RESTRAINING ORDER—
Filed and entered July 28, 1937.

Upon plaintiff's motion, duly pursuant to notice, the Court orders that the defendants, Public Service Commission of Kentucky, *et al.*, be and they are hereby restrained, until a motion herein for a temporary injunction can be heard and determined, from proceeding further against the plaintiff in the defendant's investigation Case No. 396.

The Court has found upon the verified Bill of Complaint that irreparable injury would result to the plaintiff unless such temporary restraining order is granted, in that plaintiff would be required to expend the sum of at least Twenty-five Thousand (\$25,000.00) Dollars to comply with the defendant's orders in their said Case No. 396, dated May 29th and June 30th, 1937, respectively, for which there would be no recovery in the event plaintiff should be adjudged final relief herein.

The Court further finds that this suit requires a proceeding under Judicial Code Section No. 266, and hereby convenes a Court of three judges under said section to hear the plaintiff's motion for preliminary injunction on Saturday, August 7, 1937.

The Court fixed the plaintiff's bond upon this temporary restraining order in the penal sum of One Thousand (\$1,000.00) Dollars, then came plaintiff as principal with Earl D. Wallace as surety and executed bond as required by law in said sum which the Court now examines and approves.

This July 28, 1937.

H. CHURCH FORD,
Judge.

ORDER OF SUBMISSION—Filed and entered August 7, 1937.

This cause coming on for hearing before the Honorable Zen Hicks, Judge of the Circuit Court of Appeals of the Sixth Circuit, Honorable Elwood Hamilton, Judge of the Western District, and Honorable H. Church Ford, Judge of the Eastern District of Kentucky, sitting as a court assembled under §266 of the Federal Code, thereupon came the plaintiff, Petroleum Exploration, and filed its motion for an interlocutory injunction, and on final hearing a permanent injunction in accordance with the prayer of its bill of complaint; also filed waiver of notice of this hearing by the Honorable Albert B. Chandler, as Governor of Kentucky. Thereupon, all parties having announced ready, the Court heard the testimony of the witnesses offered by the plaintiff to maintain the issue on its part, and cross examination thereof by the defendants, all reported by the Official Court Reporter as prescribed by law and the Rules of this Court. The defendants offered no testimony in chief on their part. Whereupon, by agreement of the parties, the above styled cause is finally submitted upon the entire record made herein and upon the merits for the final decision of the Court.

It is ordered that plaintiff shall have twenty (20) days from this date within which to file its brief, defendants ten (10) days thereafter in which to file their answering brief, and the plaintiff five (5) days thereafter in which to reply, all briefs to be filed in triplicate and copies thereof furnished opposing counsel at the time of filing.

By agreement of the parties, the temporary restraining order heretofore made in this cause is continued in effect until further order and final decision of this cause upon its merits.

It is further ordered that the said Official Reporter do file with the Clerk, as soon as may be, in triplicate

a transcript of the testimony adduced at the said hearing, which shall thereupon become and is made a part of the record in this suit.

H. CHURCH FORD,
Judge.

This order should be entered:

ALLEN PREWITT,
W. J. BRENNAN,
Attorneys for Plaintiff.

HUBERT MEREDITH, Atty. Gen.
J. W. JONES, Asst. Atty. Gen.
Attorneys for Defendants.

August 7, 1937.

ORDER AND DECREE—Entered January 6, 1938.

This cause having been submitted simultaneously upon plaintiff's application for an interlocutory injunction, upon its application for a permanent injunction, and for a final decree, to the Court, composed of Hon. Zen Hicks, Circuit Judge, 6th Circuit, and Hon. H. Church Ford and Hon. Elwood Hamilton, District Judges, under Section 266 of the Judicial Code of the United States, the Court, with Judge Hamilton dissenting from its conclusions of law but concurring in the dismissal for want of jurisdiction, delivered written opinions and its separate findings of fact and conclusions of law. The Court orders the opinions and the separate findings, etc., filed. Plaintiff excepts to the Court's conclusions of law, The Defendants except to that part of the Court's third finding of fact that the matter in controversy in this suit, exclusive of interest and cost, exceeds the sum of Three Thousand Dollars (\$3,000.00).

Conformably to its opinion and separate findings of fact and conclusions of law, the Court orders and decrees that the application of plaintiff, Petroleum Exploration, Inc., for an interlocutory injunction and also its

application for a permanent injunction be and they are hereby respectively denied; that the temporary restraining order be and it is now discharged; that plaintiff's bill of complaint be and it is hereby finally dismissed without prejudice to any proper proceeding, and all for want of jurisdiction in equity herein; and that plaintiff pay the costs of this proceeding, to all which order and decree the plaintiff excepts.

Pursuant to due waiver of notice by the defendants and by the Governor and Attorney General of Kentucky, through their counsel in open court, plaintiff heretofore tendered its petition for a rehearing and in the alternative its petition for an injunction or continuance of the restraining order pending the determination of its appeal to the Supreme Court of the United States.

It is ordered that said petition for rehearing and said petition for the alternative continuance of the restraining order, or for an injunction pending appeal, be and they are now filed.

The said Court having considered plaintiff's petition for rehearing and in the alternative its petition for an injunction or continuance of the restraining order pending the determination of its appeal to the Supreme Court of the United States, and the Court being advised overrules said petition for rehearing and also overrules said petition for an injunction or continuance of the restraining order pending appeal to the Supreme Court of the United States, to all of which plaintiff excepts.

In order to give plaintiff an opportunity to perfect its appeal herein to the Supreme Court of the United States, it is hereby ordered that this order and decree, insofar as it denies an injunction and dissolves the tem-

porary restraining order, be stayed for a period of thirty (30) days from the date hereof.

This January 6, 1938.

ZEN HICKS,
U. S. Circuit Judge.
ELWOOD HAMILTON,
U. S. District Judge.
H. CHURCH FORD,
U. S. District Judge.

Opinions in the Court Below.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF KENTUCKY

Frankfort—#1205

PETROLEUM EXPLORATION (Inc.) Complainants
v.
PUBLIC SERVICE COMMISSION OF KENTUCKY, etc. Defendants

Before HICKS, Circuit Judge, and HAMILTON and FORD, District Judges.

FORD, District Judge.

This is an action in equity filed by Petroleum Exploration, a corporation doing business in Kentucky but organized and existing under the laws of the State of Maine, to enjoin the Public Service Commission of Kentucky from enforcing or attempting to enforce compliance with an order of the Commission, pursuant to which the Commission proposes to inaugurate an investigation of the rates charged by complainant for gas transported by its pipe lines from its gas fields in Eastern Kentucky to the corporate limits of various Kentucky municipalities and there sold and delivered to certain public utility corporations.

The order complained of required the complainant to produce, at a public hearing before the Commission, evidence showing conclusively the fairness and reasonableness of its rates and charges, a complete statement of all contracts and working arrangements with its subsidiary corporations, if any, and to make available, for examination by the Commission's representatives, all its books, accounts, records, correspondence and memoranda.

At the time fixed for the hearing, the complainant appeared and offered a plea challenging the Commission's jurisdiction. The Commission overruled the plea and made an order fixing a later date for the proposed hearing and investigation. Before that time arrived, the complainant filed with the Commission an application for a rehearing on the jurisdictional question, together with an amended and supplemental plea which, on account of the institution of this action, has not been acted upon.

In addition to alleging diversity of citizenship and the value of the matter in controversy, required to sustain federal jurisdiction under section 24 of the Judicial Code (28 USCA §1), the bill further alleges, in substance, that the complainant, in transporting and selling its gas under contract to certain public utility corporations, is engaged merely in an ordinary private commercial enterprise, that it is not a public utility and is not subject and can not be made subject to the regulatory jurisdiction of the Commission by any law which would be valid under the State or Federal Constitution. It charges that the obvious purpose of the Commission is to attempt, without right or authority of law, to lower some or all of the rates fixed under its existing contracts, and that the order, made with that end in view, is repugnant to the contract clause of the Federal Constitution and is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The case is submitted upon complainant's motion for a temporary injunction to restrain enforcement of the order of the Commission. Permanent injunction is the ultimate relief sought.

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction." *Cruickshank v. Bidwell*, 176 U. S. 73, 80.

In *State Corporation Commission of Kansas et al. v. Wichita Gas Company*, 290 U. S. 561, it was asserted that a certain order of the State Corporation Commission of Kansas, made as a preliminary step toward ascertaining and fixing reasonable rates to be charged by a public utility, was repugnant to the Federal Constitution, and temporary and permanent injunction was sought. The court, in denying injunctive relief, said:

"We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irreparable, injunction should not be granted."

It is further alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission would be approximately \$25,000 and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this action.

The Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1934 Acts, ch. 145; Kentucky Statutes §3952b-4) provides "The commission may compel obedience to its lawful orders by mandamus or injunctions or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction", and further (sec. 9), after prescribing penalties to be imposed upon utilities for neglect or refusal to obey "any lawful requirement or order made by the commission", the Act provides: "Whenever any utility is subject to a penalty under this Act, the commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty."

It thus appears that the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission Counsel upon which he may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by enforcement of the order

against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code §237; 28 USCA §344). *Morgan v. Rogers*, 284 U. S. 521, 526.

In *Federal Trade Commission v. Claire Company*, 274 U. S. 160, certain corporations challenged the constitutional validity of orders of the Federal Trade Commission requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information relating to the business in which the complainant corporations were engaged, and sought by injunction to restrain the Commission from enforcing or attempting to enforce the challenged orders. The Court said:

"There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

"* * * Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction."

Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties

for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever.

Equity jurisdiction to grant injunctive relief should be exercised only where "in a case reasonably free from doubt" it is shown that "intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney et al.*, 248 U. S. 453, 456; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276.

The defendant filed an answer to the bill on the merits without raising the question as to equity jurisdiction. It is pointed out, however, in *Federal Trade Commission v. Claire Company, supra*, that acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, *sua sponte*. *Twist v. Prairie Oil Company*, 274 U. S. 684, 690; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied.

By stipulation the case having also been submitted for final determination, the application for a permanent injunction should be likewise denied, and the bill dismissed for want of equity.

JUDGE HAMILTON, dissenting in part:

I agree with the conclusion of the majority opinion because the Act of May 14, 1934, Chapter 283, Section 1, 48 Stat. 775 USCA Title 28, Section 41(1), withdraws from the jurisdiction of the District Courts of the United States suits enjoining the execution of orders of administrative boards or commissions where the laws of the State provide a plain, speedy and efficient remedy for a judicial review.

"The laws of the Commonwealth of Kentucky provide for an adequate judicial review of the orders and findings of its Public Service Commission. (*Carroll's Kentucky Statutes*, 1936 Edition, Sections 3952-1 to 3952-61). The plaintiff alleges in its petition that it does not come within the term "utility or utilities" as defined under *Carroll's Kentucky Statutes*, 1936 Edition, Section 3952-1, and for that reason this case does not fall within the bar of the Act of May 14, 1934; but I am of the opinion that this Act, being remedial in its nature, should be liberally construed in order that the Courts of the States may be left free to interpret their own statutes. It may be said, however, that the Public Utilities Act of the Commonwealth of Kentucky includes within its terms all persons, corporations, their lessees, trustees or receivers, producing, manufacturing, storing, distributing or selling natural or artificial gas for public consumption. The Act of May 14, 1934, cannot be avoided so as to confer jurisdiction on this Court by a naked allegation of the plaintiff that it is not one of the persons coming within the statutory law of the Commonwealth of Kentucky regulating public utilities.

The Commission, in its order, which the plaintiff seeks to enjoin in this action, found that the plaintiff was a public utility and had authority to fix its rates. The language of the Act (48 Stat. 775) expressly prohibits District Courts from enjoining any order of a State rate-making body.

Lower Federal Courts are creatures of the Congress, and their powers are confined within the Acts bringing them into existence; and whatever may be their inherent power incident to jurisdiction, the Congress can take from them the authority to grant injunctions in rate making cases and confer such power on the Courts of the State, even though a Federal constitutional right is involved. *Ex Parte Robinson*, 19 Wall. 505, 510; *Bessette v. Conkey Company*, 194 U. S. 324; *Michaelson v. United States*, 266 U. S. 42, 66; *Gillis, Receiver v. California*, 293 U. S. 62, 67.

If the majority opinion be correct, the Act of May 14, 1934, was wholly unnecessary, because in no event would the Federal Court enjoin the orders of a public utility rate making body if the State law provided an adequate judicial review.

The case of *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561, 570, relied on in the opinion of the majority, has no application to the case at bar. In the cited case, the Commission sought to compel certain pipe line companies to disclose to it facts to be used in fixing the rates of the distributing companies. The order of the Commission sought to be enjoined did not fix rates, nor was it contended as a basis for relief that the Commission was without authority to inquire into the charges of the Wichita Company. The Court said:

"The Commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227. *Chicago, M. & St. P. Ry. Co.*

v. Minnesota, 134 U. S. 418, 452, *et seq.* But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & Mackinac Ry. v. Mich. R. R. Comm'n.*, 235 U. S. 402, 405. *Napa Valley Co. v. R. R. Comm'n.*, 251 U. S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas Court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon v. Rutland R. Co.*, 232 U. S. 134, 138. *Missouri v. Chicago, B. & Q. R. Co.*, 241 U. S. 533, 542. *Ex Parte Young*, 209 U. S. 123, 166. And upon the issue or confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287, 289. *Bluefield Co. v. Pub. Serv. Comm'n.*, 262 U. S. 679, 689. *United Railways v. West*, 280 U. S. 234, 251."

The plaintiff's suit here is based solely on the ground that the laws of the Commonwealth of Kentucky do not make it subject to the jurisdiction of the Public Service Commission for any purpose. It therefore follows that if plaintiff's contention be sound, it does not have to await the outcome of administrative action before resort to the Courts to determine its rights. The question in dispute is purely a legal one and is not affected to administrative decision. *Gulf v. Interstate Natural Gas Company*, 82 F. (2) 145, 150.

Federal Trade Commission v. Claire, 274 U. S. 160, 174, does not lend support to the conclusion of the majority. In that case, the Claire Company sought to enjoin an order of the Federal Trade Commission requiring it to submit reports concerning its business, under

Section 6 of the Act creating it. The Commission's orders were enforceable only by requesting the Attorney General to institute mandamus proceedings against the recalcitrant, or by supplying him with facts necessary to enforce forfeitures. Any proceeding to compel compliance or to recover forfeitures could only be had in the United States District Court on the law side of the docket. The Court refused to grant equitable relief on the ground it had adequate remedy at law in the Federal Courts by presenting its defense to the mandatory or penalty action when instituted.

I have always understood the rule to be that the adequate remedy at law which defeats equitable jurisdiction must be such remedy in the Federal Courts, and not in the State Courts, and it must be a remedy which the Federal Courts can administer under the circumstances of the particular case, and any doubt as to the law remedy must be resolved in favor of the equitable.

The Courts have universally held that Federal Equity jurisdiction is to be tested by those rules, principles and usages as administered by the Federal Courts immediately after the adoption of the Constitution, unaffected by State statutes or practices, regardless of the antiquity of the remedy at law in the State Courts. In other words, a case cognizable by a Federal Court of Equity for inadequacy of legal remedy is still such a case regardless of State legislation or practice enlarging legal remedies, and continues thus until the Congress deprives the Federal Courts of jurisdiction.

The majority opinion, without stated legal justification, and misapplying the *Claire* case, relegates the plaintiff for relief to the Franklin Circuit Court of the Commonwealth of Kentucky, because of the provisions of the Kentucky Statutes, 1936 Edition, Sec. 3952-44.

In the case of *Smyth v. Ames*, 169 U. S. 466, 550, the Court said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

When the violator is an individual the penalties for failure to comply with the orders of the Public Service Commission are not more than \$1,000.00, or confinement in jail for not more than six months, or both, and if a corporation, not less than \$25.00 or more than \$1,000.00 for each violation, the enforcement thereof to be by the Franklin Circuit Court of the Commonwealth of Kentucky.

In the case of *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 167, the Court, quoting from *Ex parte Young*, 209 U. S. 123, 155, said:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

The case of *New Hampshire Gas & Electric Company v. Morse*, 42 F. (2) 490, 495, is directly in point. In that case the Court said:

"It is not reasonable to hold that a person must violate a law and subject himself to possible fines or imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 30 S. Ct. 286, 54 L. ed. 430."

Compare also: *Risty v. Chicago, R. I. & Pacific Railway Company*, 270 U. S. 378, 390; *City of Fort Worth v. Southwestern Bell Telephone Company*, 80 F. (2) 972; *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 74; *Grandin Farmers Cooperative Elevator Company v. Langer*, 5 F. Supp. 425, affirmed 292 U. S. 605; *City of Commerce v. Southern Railway Company*, 35 F. (2) 331; *Los Angeles Railway Company v. Railroad Commission of California*, 29 F. (2) 140.

For the reasons herein stated, I find myself unable to agree with the majority opinion.

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Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

**PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,**

v.

**PUBLIC SERVICE COMMISSION OF KENTUCKY, a
Kentucky Body Corporate, J. C. W. BECKHAM,
THOS. C. MCGREGOR and JAMES W.
CAMMACK, Appellees.**

**Appeal From the District Court of the United States for
the Eastern District of Kentucky.**

**BRIEF ON BEHALF OF
PETROLEUM EXPLORATION, APPELLANT.**

✓ EDWARD C. O'REAR and
✓ ALLEN PREWITT of
Frankfort, Kentucky,
✓ CHAS. N. KIMBALL and
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Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a
Kentucky Body Corporate, J. C. W. BECKHAM,
THOS. C. MCGREGOR and JAMES W.
CAMMACK, Appellees.

Appeal From the District Court of the United States for
the Eastern District of Kentucky.

BRIEF ON BEHALF OF PETROLEUM EXPLORATION, APPELLANT.

OPINIONS IN COURT BELOW.

The majority and dissenting opinions of the court below are reported in 21 Federal Supplement (Adv. Ops.) 254-259.

As so reported the majority opinion differs slightly from that printed in the record in the following particulars:

(1) Morgan (should be Matthews) v. Rogers, 284 U. S. 521, 526, 76 L. ed. 447, (R. 75) is omitted.

(2) Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 53 L. ed. 796, (R. 76) is omitted.

(3) The final paragraph (R. 77) was somewhat amended after the copy went to the reporter.

STATEMENT AS TO JURISDICTION.

Paragraph 1 of Rule 12 has been complied with. See "STATEMENT AS TO JURISDICTION" heretofore printed.

STATEMENT OF CASE.

The appellant, Petroleum Exploration, is a Maine corporation, duly authorized to hold property and do business as a foreign corporation in Kentucky; the appellees, Public Service Commission of Kentucky (a Kentucky body corporate) and its members, J. C. W. Beckham (Chairman), Thos B. McGregor and James W. Cammack, Jr., are all citizens of Kentucky domiciled in the eastern district thereof. This suit is wholly of a civil nature; arises under the Constitution of the United States; is, as stated, between the citizens of different states; and the matter in controversy exceeds \$3,000.00 (R. 1-2, 42-43, 82).

The appellant is engaged, among other things, in the production of natural gas from private lands in Owsley, Jackson, Clay and Knox counties, Kentucky; and its transmission intra-state through pipe lines across other private lands to the corporate limits of the municipalities of Lexington, Richmond, Irvine, London, Manchester, Somerset, Barbourville and Corbin, at each of which the gas is sold and delivered in bulk to the local gas utility.

The gas is contained in porous portions, sometimes called "pay-streaks" of a subterranean stratum or geological horizon called the Corniferous limestone, in isolated and limited areas, sometimes called "fields", and is produced by means of wells sunk thereto from the surface. The appellant's rights to operate such lands and

produce such gas are vested in it by virtue of grants from the several land owners commonly called oil and gas leases (R. 2, 22, 43, 82-83). In addition to its production from its Knox county leases appellant also purchases in the field small quantities of gas there produced by others (R. 3, 6, 44, 47, 83).

The appellant operates three pipe lines for the transmission of such gas to the points of sale: (1) From its Owsley-Jackson-Clay county leases to the corporate limits of Lexington with branch lines to the corporate limits of Richmond and Irvine, sometimes called its "Lexington Line"; (2) from its Clay county leases to the corporate limits of Somerset with branch lines to the corporate limits of Manchester and London, sometimes called its "Somerset Line"; and (3) from its Knox county leases to the corporate limits of Barbourville and Corbin, sometimes called its "Knox County Lines". These transmission lines are of metal pipe buried in the ground laid through lands pursuant to grants from the land owners of rights-of-way for the purpose (R. 5, 26, 46, 84).

The distributor at Lexington, Richmond and Irvine (and at Ravenna adjacent thereto) is Central Kentucky Natural Gas Company, hereinafter sometimes abbreviated "Central"; at London, Edwards & Eversole Gas Company; and at Barbourville, Corbin, Manchester and Somerset, Peoples Gas Company of Kentucky, hereinafter sometimes abbreviated "Peoples". Formal contracts have been entered into between the appellant and each of such distributors for delivery of gas at each of such municipalities (except Ravenna), save the contract for delivery at Richmond and Irvine was made by the appellant with one D. L. Johnson, who assigned his rights thereunder to East Kentucky Gas Company which, in turn, assigned them to the Central (R. 2-5, 22-

26, 43-45, 83-84). These contracts provide for delivery in the aggregate of approximately a billion cubic feet of gas annually at an aggregate price of about \$350,000.00 and have from nine years upward to run (R. 22-26, 83-84, 86). "1937" stated at page 2 of the record as the date of the Lexington contract is due to an error in the transcript; it should be "1927". See pages 22, 44, 83. All of these contracts were entered into before the Kentucky Utilities Act (Acts 1934, c. 145, effective June 14, 1934, as amended by Acts 1936, c. 92, effective May 16, 1936, appearing as secs. 3952-1 to 3952-61, inclusive, of Carroll's Kentucky Statutes, Annotated, Baldwin's 1936 Revision, hereinafter sometimes abbreviated "Ky. Stat." pertinent sections from which are printed in the appendix).

There is no affiliation and never has been between the appellant and said Central, D. L. Johnson, East Kentucky Gas Company or Edwards & Eversole Gas Company; and appellant's contracts for deliveries to them at Lexington, Richmond, Irvine and London, respectively, were entered into at arm's length (R. 12, 54, 66-68, 83-84).

The appellant owns 25/32nds of the outstanding capital stock of the Peoples and in addition has advanced to it the sum of about \$200,000.00 (R. 11-12, 53, 84).

The contracts with the non-affiliates, the Central, D. L. Johnson (now the Central) and Edwards & Eversole Gas Company state the quantities of gas to be delivered annually thereunder (R. 22-23, 23, 25-26).

All gas delivered pursuant to such contracts at each of the mentioned municipalities is distributed in such municipality by the buyer, except that gas delivered at Irvine is also distributed in Ravenna, adjacent thereto (R. 6, 7, 8, 10, 11, 47, 48, 49, 50, 51, 52, 52-53, 84-85).

The appellant's transmission lines are not interconnected and are independently operated (R. 5, 46); and all gas passing through them is owned exclusively by the appellant and is produced by it save for the small quantities so purchased in the Knox county field (R. 46-47). All gas flowing through the Lexington Line is sold and delivered to non-affiliated buyers, that is, the Central at Lexington, formerly D. L. Johnson, later East Kentucky Gas Company, and now the Central, at Richmond and Irvine. All gas flowing through the Knox County Lines is sold and delivered to appellant's subsidiary, the Peoples, at Barbourville and Corbin. All gas flowing through the Somerset Line is sold to the Peoples at Manchester and Somerset, except ten million cubic feet annually to Edwards & Eversole Gas Company, at London, a non-affiliate (R. 2-5, 43-46, 83-84).

The distribution of gas in each of the municipalities is made pursuant to a franchise for the purpose granted to the utility by the municipality by authority of sec. 164 of the Kentucky Constitution; and as authorized by that section the distribution rates for gas in each municipality were fixed by contract, in reference to the franchise, entered into between the municipality and the local utility or its predecessor prior to the enactment of the Utilities Act. Each of these rate contracts was parcel of the franchise except in the case of Lexington the rates were originally fixed by resolution duly accepted and thereafter made part of the original franchise by amendment. The bill avers and the answer admits that each of these rate contracts was made pursuant to the authority conferred on the municipality by sec. 164 of the Kentucky Constitution; however, the answer qualifies its admissions by further stating that such contracts are subject as a supposed matter of law to "modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and em-

powered by *subsequent* legislation (Italics ours; R. 6-11, 26-39, 47-53, 84-85).

The Utilities Act establishes the Commission and gives it rate regulatory power over certain "utilities" therein defined, *inter alia*, as follows:

"* * * corporations * * * that now or may hereafter own, control, operate or manage * * * (two) any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat and power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *" (Sec. 1 (c); Ky. Stat. 3952-1).

With respect to the rate base the Utilities Act (sec. 4 (f); Ky. Stat. 3952-19) provides:

"* * * In arriving at a valuation of property of any utility as provided in this section the Commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes. * * *"

Sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) expressly undertakes to authorize the Commission to change rates fixed by "any contract, franchise or otherwise, between any municipality and any such utility".

On May 29, 1937 the Commission on its own motion entered an order *ex parte* finding the appellant to be a wholesaler of gas and a "utility" as defined in the Utilities Act and subject to the Commission's jurisdiction; initiating an investigation of the appellant's wholesale

gas prices; setting a public hearing for June 29, 1937, "at which time and place any person interested may appear and present such evidence as may be proper"; and citing the appellant to appear "and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are, in turn, selling the same at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable"; and requiring the appellant to make its "books, accounts, records, correspondence and memoranda * * * available for examination by Commission's representatives". The complete text of the order is quoted in the bill (R. 14-16) and answer (R. 56-58).

It seems obvious from the tenor of the order that it was the object of the Commission not merely to gather information but also to regulate the appellant's wholesale gas prices. If there could be any doubt about the interpretation of the order it is set at rest by the defendants' own construction thereof in their answer (R. 60) as follows:

"Defendants * * * aver that the purpose of the said Commission in instituting and conducting said investigation and proceeding was to determine a fair and reasonable price or rate to be charged by the complainant pursuant to the aforesaid contracts, and to fix said price or rate."

The appellant, conceiving its wholesale gas prices to be not subject to the rate regulatory power of the Commission, and, even though a judicial question, out of deference and an abundance of precaution, appeared on the day mentioned and offered its objections to the Commission's authority in that behalf, in the nature of a plea to its jurisdiction. The plea was summarily overruled and another order entered by the Commission on

or as of that day again finding the appellant to be a "utility" as defined in the Utilities Act and setting the investigation for further hearing on July 29, 1937. The entire text of this order is set out in the bill (R. 16-17) and answer (R. 58-59).

Nothing in the way of traverse or avoidance was filed or testified to in opposition to the appellant's objections to the Commission's jurisdiction and its findings were not based upon any evidence adduced before the Commission but, to use the words of the defendants' answer, "said alleged findings are not findings, but are merely statements made by the Commission based on general information of the members of said Commission" (R. 16, 20, 58, 63, 86).

Within twenty days after the last mentioned order as provided in sec. 6 (d) of the Utilities Act (Ky. Stat. 3952-36) the appellant filed with the Commission its application for rehearing and amended and supplemental objections to the jurisdiction. The objections made are substantially the same as those set forth in the bill of complaint (R. 17-18, 39-40, 59-60, 85).

The complainant is the sole respondent to the investigation, being the Commission's case No. 396 (averred R. 18; not denied R. 60); and the Commission has made no effort to reduce the rates of any of the distributing utilities, but the defendants (R. 61) "aver that any reduction of any of said prices so charged by the complainant to the respective distributors for said gas so sold and delivered would be in the public interest and would accrue to the consuming public through other and *subsequent* regulatory action by the said Commission." (Italics ours).

The appellant's books have never been kept in accordance with the system of accounting prescribed by the Commission for gas utilities. To set them up according to that system would cost \$1,500.00 if the Commis-

sion were to agree to certain adjusting entries. If it were not to agree, the cost of so setting them up from the original sources of the appellant's accounting information would be \$5,000.00 or more (R. 68-69). To employ a firm of competent engineers to appraise the appellant's gas production and transmission properties would cost not less than \$15,000.00. In addition thereto, the appellant would be under the necessity of rendering the engineers such additional service as would cost it not less than \$5,000.00 (R. 70-71). Hence, it would cost the appellant at least \$21,500.00, exclusive of attorney's fees, to comply with the Commission's order. The court below, in its findings of fact, did not undertake to fix the cost of such compliance other than that, exclusive of attorney's fees, the expense to appellant "would be more than \$3,000.00" (R. 86).

Notwithstanding the pendency of the petition for rehearing and the amended and supplemental objections the Commission threatened and intended to proceed with the investigation on the date last set, July 29, 1937 (R. 18, 60, 85).

On July 24, 1937, (R. 1) the appellant filed its bill of complaint and exhibits and gave notice of an application for a restraining order (R. 41).

The bill (R. 1-22) attacks the Commission's authority to regulate appellant's wholesale prices for gas under the due process, equal protection and contract clauses of the United States Constitution (R. 12-13, 18-19). The bill prays for injunctive relief against the investigation insofar as the Commission thereby seeks to regulate the appellant's wholesale gas prices severally in respect of the price fixed by each such contract (R. 20-22).

The court below granted a temporary restraining order on July 28, 1937 (R. 41). The cause came on for hearing on motion for an interlocutory injunction and also by stipulation for final decision on the merits on

August 7, 1937; and by like stipulation the restraining order was continued pending such decision (R. 64-65). For reasons set forth in the majority (R. 73-77) and minority (R. 77-81) opinions, interlocutory and permanent injunctions were denied, the restraining order discharged, and the bill dismissed "for want of jurisdiction in equity herein" (R. 88).

The majority (Circuit Judge Hicks and District Judge Ford) held that, assuming but not deciding the appellant's constitutional objections to be well founded, it could stand by until the Commission had completed its investigation and entered its final determination and sought to enforce the same in the state court by mandamus under sec. 4(b) of the Utilities Act (Ky. Stat. 3952-13) or for the recovery of penalties under sec. 9 thereof (Ky. Stat. 3952-61) and then assert such objections by way of defense, with the ultimate right of appeal to this Court after exhausting its defense in the state courts, which was an adequate remedy at law and ousted the equitable jurisdiction. The minority (District Judge Hamilton) filed a dissent wherein he disagreed with the position of the majority but agreed in the result thereof because, so he held, the appellant's cause had been removed from the jurisdiction of the United States district courts by the Johnson Act (Act of Congress of May 14, 1934, c. 283, sec. 1, 48 Stat. 775, amendatory of sec. 24 of the Judicial Code, U. S. C. tit. 28 and 41 (1)), which he further held was remedial and hence should be liberally construed. The majority opinion does not mention the Johnson Act; and it is plain that they did not deem it applicable. The appellees made no question in the court below of its jurisdiction, either federal or equitable, save the amount in controversy.

SPECIFICATION OF ASSIGNED ERRORS URGED.

We are mindful that, the court below having dismissed the bill of complaint for supposed want of equity jurisdiction without passing on the merits, this Court in all likelihood will not pass thereon (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659); however, the matter being one of appellate policy and not lack of power, we address ourselves to the merits as well as to the jurisdiction and rely upon all assignments of error appearing at pages 93-97 of the printed record, to which reference is made in avoidance of unnecessary repetition. Perhaps, though, it might be helpful to state generally the appellant's main contentions, as follows:

(1) That the court below had jurisdiction, both equitable and federal.

(2) That (a) appellant's Lexington Line wholesale gas deliveries to the Central, a non-affiliate, at Lexington, Richmond and Irvine are private, not "affected with a public interest", and not, therefore, subject to price regulation; and (b) so also are its wholesale gas deliveries from its Somerset Line to Edwards & Eversole Gas Company, a non-affiliate, at London.

(3) That the Central's rates at Lexington, Richmond, Irvine and Ravenna, Edwards & Eversole's rates at London, and the Peoples' rates at Manchester, Somerset, Barboursville and Corbin are fixed by franchise rate contracts, entered into by the respective municipalities (pursuant to specific authority of sec. 164 of the Kentucky Constitution as construed by the Kentucky Court of Appeals) with the distributing utilities, which contracts are within the protection of the contract clause; and that the Commission, therefore, sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) to the contrary notwithstanding, is without lawful authority to alter such

rates; wherefore, the Commission is without lawful authority to regulate appellant's wholesale gas prices to the distributors, as only they and not the public would benefit by any reduction; and such regulation would hence impair the obligation of the wholesale contracts and deprive the appellant of its property without due process.

(4) That even in the absence of the franchise rate contracts at Manchester, Somerset, Barbourville and Corbin the Commission would have authority only to regulate the retail rates of the subsidiary, Peoples, and, in so doing, to fix a reasonable allowance to it as an operating expense for gas delivered by the appellant; but that the Commission can not regulate the manner in which the revenues derived by the Peoples from the public are to be divided between it and the appellant by means of the wholesale contracts, as that is purely an intercorporate matter, for which the Commission can not substitute its judgment.

SUMMARY OF ARGUMENT.

Jurisdiction.

- (a) The amount in controversy exceeds \$3,000.00.
- (b) The court below had equitable jurisdiction.
- (c) The Johnson Act is inapplicable to this suit.

The Merits.

- (a) Appellant's sales to non-affiliates is a private enterprise not affected with a public interest and not subject to regulation.
- (b) The appellant's business of selling gas to non-affiliates is separable from its sales to its subsidiary, the Peoples.

- (c) The Commission is without authority to directly regulate the appellant's contracts with its subsidiary.
 - (d) The franchise rate contracts are valid because:
 - (1) They are within the protection of the contract clause of the United States Constitution, if authorized.
 - (2) They are authorized by the Kentucky Constitution.
 - (3) The Kentucky Constitution has been so construed by the courts of Kentucky and of the United States.
 - (4) It has been so construed by the General Assembly of Kentucky.
 - (5) The validity of such contracts is unaffected by sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) and the *obiter dicta* in reference thereto.
 - (6) A judicial decision construing a statute, under compulsion thereof, is part of the statute and a "law" as used in the contract clause.
 - (e) The attempted regulation of the appellant's business deprives it of its property without due process of law.
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ARGUMENT.**JURISDICTION****Amount in Controversy.**

The bill avers (R. 2) and the answer denies (R. 43), both generally, that the amount in controversy exceeds \$3,000.00. The court found the amount to exceed that sum (R. 82) and the defendants excepted (R. 88). However, the bill further avers (R. 2-5) and exhibits (R. 22-26) and the answer admits (R. 43-46) contracts with nine years upward to run for the sale of approximately a billion cubic feet of gas annually at an approximate aggregate price of \$350,000.00; and the court so found (R. 86); and the defendants did not except. Reduction of even a cent per 1,000 cubic feet would result in an annual loss to the appellant of \$10,000.00.

An answer cannot admit the facts and deny the conclusion. *Davis v. Green*, 260 U. S. 349, 350, 67 L. ed. 299. "Specific admissions in the answer must outweigh general denials". *Puget Sound International Ry. & P. Co. v. Kuykendall* (D. C. Wash.), 293 Fed. 791, 792.

In addition as shown in the statement of the case it would cost the appellant from \$21,500.00 up to comply with the Commission's citation to produce evidence to conclusively show the reasonableness of appellant's wholesale prices according to the formula for valuation prescribed by sec. 4 (f) of the Utilities Act (Ky. Stat. 3952-19).

Evidence of attorney fees was not introduced since the members of the court were experts in the fixation thereof (*McDougal v. Black Panther Oil & Gas Co.* (8th C. C. A.) 277 Fed. 701, 707, headnote 7; and *Tracy v. Spitzer-Rorick Trust & Savings Bank* (8th C. C. A.), 12

Fed. (2d) 755, 756-7), and we did not feel that they would be instructed by the testimony of other experts.

Under the circumstances mentioned the amount in controversy far exceeds \$3,000.00. Compare *Western & Atlantic Railroad v. Railroad Commission*, 261 U. S. 264, 267, 67 L. ed. 645; *Packard v. Banton*, 264 U. S. 140, 142, 68 L. ed. 596; and *Tyson & Bro. v. Banton*, 273 U. S. 418, 426, 71 L. ed. 718.

Equitable Jurisdiction.

The price of appellant's standing by until the Commission has completed its investigation and made its final determination is (1) to permit the Commission to fix the appellant's wholesale contract gas prices upon the Commission's own *ex parte* evidence; (2) to sacrifice the appellant's right to judicial review of the Commission's determination, which must under sec. 7 (a) of the Utilities Act (Ky. Stat. 3952-44) be commenced within twenty days; and (3) to expose the appellant and its officers, agents and employees to fines, penalties and punishment under sec. 9 of the Utilities Act (Ky. Stat. 3952-61).

The alternative is the expenditure of \$21,500.00 and up in complying with the Commission's order of investigation. If it should then develop that the Commission is without authority to regulate appellant's wholesale prices the loss of such expenditure would obviously be irreparable.

So far as penalties are concerned the appellant's plight is well illustrated by the opinion in *Wadley Southern Railway Co. v. Georgia*, 235 U. S. 651, 59 L. ed. 405. In that case the railroad company did the very thing suggested as appellant's proper course by the majority

opinion below, that is, stood by and treated as void an order of the railroad commission of Georgia and later sought to defend in an action for a penalty upon the ground of the unconstitutionality of the order. The defense proving not well founded, the company was mulcted in the penalty. The opinion pointed out that the company should have promptly availed itself of a judicial remedy to test the validity of the order. In conclusion (p. 669) it was said:

"If the Wadley Southern Railroad Company had availed itself of that right, and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

"But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful,"

It was also noted (p. 660) that the validity of the order could have been attacked either in the state or federal courts.

"* * * In the Federal courts the method of procedure when administrative orders are attacked is now regulated by §266 of the Judicial Code * * *" (p. 661).

In their opinion the majority below cited in support of the supposed lack of equitable jurisdiction *Cruikshank v. Bidwell*, 176 U. S. 73, 80, 44 L. ed. 377; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796; *Cavanaugh v. Looney*, 248 U. S. 453, 456, 63 L. ed. 354; *Federal Trade Commission v. Claire Co.*, 274 U. S. 160, 71 L. ed. 978; *Morgan (Matthews) v. Rogers*, 284 U. S. 521, 526, 76 L. ed. 447; and *State Corporation Commission of Kansas v. Wichita Gas Co.*, 290 U. S. 561, 78 L. ed. 500.

In *Cruikshank v. Bidwell* an importer of teas, impounded by the customs collector as impure and unwholesome, sought an injunction to restrain the collector from further withholding the teas and from destroying them (p. 79). It was said (p. 81):

“Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. * * *”

In *Boise Artesian Hot & Cold Water Co. v. Boise City*, the company sought an injunction against an action at law brought against it by the city in a state court for the recovery of license fees imposed by the city for use of its streets for mains, etc. Naturally, the supposed invalidity of the ordinance could have been urged in the law action, which could, as was pointed out (p. 287), had the company acted seasonably, been removed to the federal court.

In *Cavanaugh v. Looney*, this Court refused to enjoin the Attorney General of Texas and the Board of Regents of the University of Texas from instituting proceedings for the condemnation of all or a portion of the appellants' premises to extend the campus of the University, saying (p. 456):

"When considered in connection with established rules at law relating to the power of eminent domain, complainants' allegations of threatened 'irreparable loss and damage' appear fanciful.
* * *

In *Federal Trade Commission v. Claire Furnace Co.*, the court below enjoined enforcement of an order of the Commission requiring the complainant companies "to furnish monthly reports of cost of production, balance sheets and other voluminous information in detail upon a large variety of subjects relating to the business in which complainant corporations" were engaged. The Federal Trade Commission Act specially provided for the issuance of writs of mandamus for compliance with the Commission's lawful orders and for prosecution for penalties for failure to testify or report, upon application by the Commission to the Attorney General. It was held in effect that the Commission should first submit the legality of its inquiries to the Attorney General after whose decision the complainants would have ample opportunity to comply or contest an enforcement proceeding on the law side of the *federal district court*. See page 174:

"* * * It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful, before asking the court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law

officer of the government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. * * *

In *Matthews v. Rogers*, the appellees secured an injunction in the court below against the imposition of a state privilege tax on persons engaged in the business of buying and selling cotton. The case largely turned upon whether the tax, if illegal and paid under protest, could be recovered under the laws of Mississippi. Having determined this in the affirmative (pp. 526-527), under the uniform rule the decree of injunction was reversed and each party left to the payment of the tax and his remedy for recovery thereof in the state courts "or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present" (p. 526).

In *State Corporation Commission v. Wichita Gas Company*, the scope of the Commission's investigation as ultimately determined was not to fix rates of the distributors nor the price for gas charged them by the pipe line company which was an interstate carrier (pp. 563-564), but to ascertain the charges made by holding or affiliated companies for services rendered and commodities furnished the distributing companies with a view in subsequent proceedings of allowing only reasonable amounts therefor as operating expenses to the distributors (pp. 564-565, 569). It was held that the Commis-

sion's order neither fixed appellees' rates nor the price to be paid to the pipe line company; and that the facts thereby found were not *res adjudicata* and could be attacked in a subsequent proceeding to fix the appellees' rates after which they were entitled to a day in court. In that case there was no question of the Commission's jurisdiction to fix the rates of the appellees which distributed gas at retail in a number of Kansas municipalities.

An action under sec. 9 of the Utilities Act (Ky. Stat. 3952-61) by the Commonwealth of Kentucky against the appellant for recovery of penalties therein prescribed would not be removable to the Federal District Court under Judicial Code sec. 28, as amended, (U. S. C., tit. 28, sec. 71) since (1) the action would not arise under the Constitution or laws of the United States, nor (2) would it be between citizens of different states, the Commonwealth not being a citizen. *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 46 L. ed. 144. So also, an action of mandamus brought by the Commissioner under sec. 4 (b) of the Utilities Act (Ky. Stat. 3952-13) would likewise not be removable. *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. ed. 743.

"Rules of comity or convenience must give way to constitutional rights". *Oklahoma Natural Gas Co. v. Russell*, *supra*, 293. Accord: *Pacific Telephone & Telegraph Co. v. Kuykendall*, 265 U. S. 196, 204-205, 68 L. ed. 975; and *Railroad & Warehouse Commission v. Duluth Street Railway Co.*, 273 U. S. 625, 628, 71 L. ed. 807, as follows:

"* * * But the plaintiff, if it prefers to entrust the final decision of the courts of the United States rather than to those of the state, has a right to do so. * * * But as against these considerations it must be remembered that the requirement

that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the district court of the United States."

There are abundant decisions in this Court that injunction is an apt remedy to prevent an unlawful attempt to regulate one's business and affairs. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984; *Packard v. Banton*, *supra*, 143; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445; *Tyson & Bro. (United Theatre Ticket Offices) v. Banton*, *supra*, 427-8; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239, 73 L. ed. 287; and *Thompson v. Consolidated Gas Utilities Co.*, 300 U. S. 55, 59, 81 L. ed. 510.

It is equally well settled by the decisions of this Court that one is not obliged to take the risk of prosecution, fines and penalties, of imprisonment of one's officers, agents and employees, or of the loss of one's property in order to test the constitutionality of an attempted regulation of one's business and affairs, rather than resort to the equitable remedy of injunction. Compare *Truax v. Raich*, 239 U. S. 33, 37-9, 60 L. ed. 131; *Pennsylvania v. West Virginia*, 262 U. S. 553, 592-3, 67 L. ed. 1117; *Terrace v. Thompson*, 263 U. S. 197, 215-6; 68 L. ed. 255; *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 386, 71 L. ed. 303; *Swift & Co. v. United States*, 276 U. S. 311, 326, 72 L. ed. 587; *City Bank Farmers Trust*

Co. v. Schnader, 291 U. S. 24, 34, 78 L. ed. 628; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 414, 79 L. ed. 446; and *Carter v. Carter Coal Co.*, 298 U. S. 238, 287-8, 80 L. ed. 1160.

It is equally well settled by the decisions of this Court that the test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy at law *in the federal court*, and not the presence or absence of such a remedy *in a state court*. Compare *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819; *Chicago, B. & Q. Railroad Co. v. Osborne*, 265 U. S. 14, 16, 68 L. ed. 878; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 70 L. ed. 641; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 126-7, 74 L. ed. 737; *City Bank Farmers Trust Co. v. Schnader*, *supra*, 29; and *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69, 80 L. ed. 47.

The Johnson Act.

The Johnson Act is as follows:

“* * * Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) *affects rates* chargeable by a *public utility*, (2) does not interfere with interstate commerce, and (3) has been made after *reasonable*

*notice and hearing, and where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State. * * *.*" (Italics ours).

The Act does not embrace every order of the Commission, but only an order which "affects rates". The Commission's orders may cover a wide variety of other subjects. Compare secs. 4 (e), (i), (k) and (l) of the Utilities Act (Ky. Stat. 3952-18, -22, -24 and -25) respecting orders affecting utility rules, regulations, practices, equipment, appliances, facilities, service, accounting, securities, construction, extensions, etc.

It is the purpose of the Act to take away from the United States district courts jurisdiction to enjoin rates fixed by a rate-making authority on the often encountered ground of confiscation, and usually so called. The Act also mentions diversity of citizenship, but since the legislative authority is supreme in its own sphere except as limited by the Constitution, all of the cases necessarily involve the charge of confiscation, unless it be one where an action might be brought under a state statute to review the rate-making order in a federal court on the ground of diversity of citizenship as in *Helena Water Co. v. Helena* (D. C. Ark.), 277 Fed. 66.

The Act assumes that a complainant is a "public utility" and subject to the jurisdiction of the rate-making authority, which in fixing rates acts, of course, in a purely legislative capacity. "Affect" is variously defined as "to act upon", "to influence", "to change", "to alter", etc. A rate may be established, increased, decreased or repealed; discounts for prompt payment and penalties for delinquencies are but decreases or increases. This exhausts the gamut of "affecting" a rate.

The orders complained of are not of that nature. They undertake to find that the appellant is a "utility"

in respect of all its gas sales, to non-affiliates as well as to its subsidiary, and that all its wholesale prices are subject to the rate regulatory jurisdiction of the Commission, notwithstanding the franchise rate contracts, whereon to base the attempted investigation thereby initiated for the purpose of regulating such wholesale prices.

The appellant's status in respect of its wholesale deliveries to non-affiliates as a utility *vel non* is a judicial and not a legislative question. Compare *Terminal Taxicab Co. v. Kutz*, *supra*; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 536-7, 67 L. ed. 1103; *Michigan Public Utilities Commission v. Duke*, *supra*, 557-8; *Tyson & Bro. v. Banton*, *supra*, 431. The situation is analogous to the determination of what is a public use, which is a judicial and not a legislative question. Compare *Cincinnati v. Vester*, 281 U. S. 439, 446, 74 L. ed. 950. It is obvious that the inviolability of the franchise rate contracts under the contract clause and the constitutionality of sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27) under the contract and due process clauses are purely judicial questions. It, therefore, seems plain that in undertaking to find the appellant to be a utility and subject to its rate-regulatory jurisdiction, the Commission has invaded the province of the judiciary; and that the orders entered are not legislative in character and not within the purview of or as contemplated by the Johnson Act.

While the appellant appeared before the Commission and questioned its jurisdiction, for the same reasons herein complained of, that was but natural, out of deference, abundant precaution, and in the hope of avoiding expensive litigation.

In any event the Commission's actions do not meet the specifications of the Johnson Act. Its findings as to the appellant's supposed utility status and its own jurisdiction were not based upon any evidence adduced before the Commission but were "merely statements made by the Commission based on general information of the members of said Commission" (R. 16, 20-58, 63, 86). That was not a "hearing" after "reasonable notice" as required by the Johnson Act, but an "exercise of arbitrary power". Compare *Interstate Commerce Commission v Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93, 57 L. ed. 431 ("* * * the Commissioners cannot act upon their own information as could jurors in primitive days. * * *"); *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, 265-6, 68 L. ed. 667 ("* * * To refuse to consider evidence introduced, or to make any essential finding without supporting evidence, is arbitrary action. * * *"); *Northern Pacific Railway Co. v. Department of Public Works*, 268 U. S. 39, 44-5, 69 L. ed. 836 ("* * * An order based upon a finding made without evidence (citation), or upon a finding made upon evidence which clearly does not support it (citation), is an arbitrary act against which courts afford relief. * * *"); *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 71, 79 L. ed. 761; and *Railroad Commission v. Pacific Gas & Electric Co.*, 82 L. ed. (Adv. Ops.) 327, 330 ("The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimum requirement. (Citation): There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. (Citations) * * *").

The court below found (R. 86) :

“* * * all its orders in this matter have been based wholly upon the *ex parte* information of the defendant members of the Commission.”

To have to drag through a price-fixing investigation in order to determine the question of appellant's being subject to the jurisdiction of the Commission is not a “plain, speedy and efficient remedy” to try that question, as prescribed by the Johnson Act; yet it is extremely doubtful if anything other than a final determination or order of the Commission is reviewable under Sec. 7 (a) of the Utilities Act (Ky. Stat. 3952-44), or otherwise in the state courts. See *Smith v. Southern Bell Telephone & Telegraph Co.*, 268 Ky. 421, 104 S. W. (2d) 961. In that case the plaintiff brought a mandatory action against the defendant to furnish certain service. The Kentucky Court of Appeals without inquiring if the defendant had filed schedules of service of the type demanded and rates therefor under sec. 5 of the Utilities Act, which could be enforced judicially, remitted the plaintiff to the Commission for relief pointing out that he would then have the right of appeal to the state courts under the provisions of the Utilities Act. If a remedy in the state courts be doubtful, the Johnson Act is inapplicable. Compare *Corporation Commission v. Carey*, 296 U. S. 452, 457-8, 80 L. ed. 324; and *Mountain States Power Co. v. Public Service Commission*, 299 U. S. 167, 169-70, 81 L. ed. 99.

“Rates”, as used in the Johnson Act, as in other statutes, denotes a uniform remuneration for a service rendered to all alike, fixed in advance and published, and not the subject of negotiation for each separate service. The term does not comprehend a single transaction, evidenced by formal agreement, entered into after extended negotiations at arm's length, for the delivery of large

quantities of a commodity over a term of years, at a stipulated price per unit.

“* * * ‘rates’ must be held to mean a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.”

State v. Spokane & Inland Empire Railroad Co.,
89 Wash. 599, 154 Pac. 1110, L. R. A. 1918
C, 675, 680.

“The Commission’s powers are confined to those rates, tolls or charges that the public must pay for service.”

Chippewa Power Co. v. Railroad Commission,
(Wis.), 205 N. W. 900.

The object of this suit is not to enjoin the enforcement of any legislative order of the Commission affecting rates but to prevent the coerced expenditure of \$21,500.00 and up except under menace of suffering sacrifice of appellant’s property far more serious. The appellant’s dilemma is immediate and dangerous; its attack on the jurisdiction of the Commission to regulate its wholesale prices is *bona fide*. It is the morality of modern equity jurisprudence that in such a dilemma constitutional rights may and should be determined before the incurrence of loss of property or penalties; nor was the Johnson Act intended to the contrary.

The attack in this cause is not on an order which “affects rates”, that is, a rate-making order; but (as in *Terminal Taxicab Co. v. Kutz*, *supra*, 257) strikes at the jurisdiction of the Commission over the appellant’s business severally with respect to each of its wholesale contract gas prices. The appellant seeks to judicially ascertain (and it is a judicial question) if the Commission has or has not rate-regulatory jurisdiction of its whole-

sale gas business; if not, then the appellant should not be put to excessive expense in an unnecessary showing of the reasonableness of its wholesale prices.

While a valid exercise of legislative policy, the Johnson Act can scarcely be said to supply a defect or abridge a superfluity in the common law, which is, according to Blackstone, the object of remedial legislation. Compare 1 *Bl. Com.* 86-7.

THE MERITS.

Sales to Non-Affiliates.

The production of natural gas and its transmission from and across private lands, pursuant in each case to appropriate grants from the several landowners, and its sale in bulk at arm's length by term contracts to non-affiliated distributing utilities is a private enterprise not affected with a public interest and not subject to price regulation. Compare *United States v. Uncle Sam Oil Co.* (of the Pipe Line cases), 234 U. S. 548, 561-562, 58 L. ed. 1459; *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 126-127, 76 L. ed. 655; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290, 308, 78 L. ed. 1267; *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 78-79; *Natural Gas Pipeline Co. v. Slattery*, 82 L. ed. (Adv. Ops.), 205, 208; *Nowata County Gas Co. v. Henry Oil Co.* (8th C. C. A.), 269 Fed. 742, 745-747; *Puget Sound International Ry. & P. Co. v. Kuykendall* (D. C. Wash.), *supra*, 793-794; *Texoma Natural Gas Co. v. Railroad Commission* (D. C. Tex.; three judges), 59 Fed. (2d) 750, 752-753; *Central Kentucky Natural Gas Co. v. Railroad Commission* (D. C. Ky.; three judges), 60 Fed. (2d) 137, 139; *Pennsylvania R. Co. v. Pittsburgh L. & W. R. Co.* (6th C. C. A.), 83 Fed. (2d) 861, cert. den. 299 U. S. 572, 81 L. ed. 421; and

Southern Ohio Power Co. v. Public Utilities Commission (Ohio), 143 N. E. 700, 34 A. L. R. 171.

All gas passing through the Lexington Line is produced by Petroleum Exploration and sold exclusively to the Central, a non-affiliate, at Lexington, Richmond, and Irvine; and all gas passing through the Somerset Line is produced by the appellant and part thereof (10,000,000 cubic feet annually) sold Edwards & Eversole Gas Company, a non-affiliate, at London; and the remainder sold to appellant's subsidiary, Peoples, at Manchester and Somerset. The sales to the Central and Edwards & Eversole are not "affected with a public interest" in legal contemplation. Of course, in a general way, the public has a price interest in the product of every business, including that of the butcher, the baker and the miner (under which classification the appellant falls), however, the interest is not such as to deprive the proprietor of the right to fix the price for his product especially when not sold or delivered to the public.

A franchise is a matter of public grant and entails the correlative duty of public service. The appellant occupies no such relation, either directly or indirectly, to the public of Lexington, Richmond, Irvine, Ravenna or London. Compare *Terminal Taxicab Co. v. Kutz*, *supra*. Others have acquired the public privilege and have undertaken the public service. They have contracted with the appellant for specified quantities of natural gas, not to be delivered to the public, but in bulk to the distributor at the corporate limits for ultimate delivery to the public by the distributor through its own mains. The appellant and each of the Central, D. L. Johnson and Edwards & Eversole dealt at arm's length. Under such circumstances, the price fixed is the best evidence of what was fair; the appellant was not obliged

to sell, nor they to buy. This Court has broadly implied, if not held, that an arm's-length contract of this nature is not subject to public regulation. Compare *Western Distributing Co. v. Public Service Commission*, *supra*, 126-127; *Dayton Power & Light Co. v. Public Utilities Commission*, *supra*, 308; and *Natural Gas Pipeline Co. v. Slattery*, *supra*, 208. The court below, in a three-judge case, *Central Kentucky Natural Gas Co. v. Railroad Commission*, *supra*, 139, has held that such a contract should be accepted "as part of the cost of operation". That there is no affiliation, domination or control whatsoever, direct or indirect, immediate, intermediate or remote, between the appellant on the one hand and the Central, or D. L. Johnson, or his assignees, or Edwards & Eversole, on the other hand, is beyond question. It is so alleged in the bill (R. 12); not denied by the answer, save lack of knowledge (R. 54); proved (R. 66-68); found by the court below (R. 84); and not excepted to by the defendants (R. 88-89).

Assuming, merely for the purpose of argument, that appellant's wholesale prices are too high the remedy lies not in the Commission's reduction thereof but in the Commission's allowing to the distributing utility as an operating expense only the reasonable value of the gas. Compare *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 14, 53 L. ed. 371; *Citizens' Pass. Ry. Co. v. Public Service Commission*, 271 Pa. 9, 114 Atl. 642; *Chippewa Power Co. v. Railroad Commission* (Wis.), *supra*. If the Commission has jurisdiction to reduce the appellant's wholesale prices then it would have like jurisdiction to raise them which, as the Pennsylvania court pointed out, in the case cited, "would be a great surprise to everybody". If after investigation it should develop that the appellant's wholesale prices do not furnish an adequate return upon the value of its properties, that the Commission has no intention of raising such prices is obvious

from the fact that only the appellant, and none of its purchasers, is party to the investigation.

Let us look at the situation from the viewpoint of others who sell, at arm's length, to distributing utilities in the competitive market. A coal operator, in making a term contract for the delivery of coal to a manufactured gas utility would be subject to the jurisdiction of the Commission to fix the price of coal at something different from that agreed to by the operator in competition with others. So, also, as to the price which a natural gas distributing utility pays a founder for his pipe, a stationer for his supplies, land owners as bonus and delay rentals for its own leases, and every other conceivable item which the utility must enter the competitive market to purchase. In short, the utility's management might just as well abdicate and the Commission install its own manager.

Properly construed the Utilities Act does not embrace the appellant's wholesale gas business at Lexington, Richmond, Irvine and London. The Act speaks of "any facility * * * for * * * the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas". Of course, "manufacture" and "manufactured" may be eliminated; also "storage" as the Court judicially knows that natural gas cannot be stored for market. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 59; and *Transcontinental Oil Co. v. Spencer* (5th C. C. A.), 6 Fed. (2d) 866, 868, headnote 2. Also, appellant does not sell, distribute or furnish (directly or indirectly) to the public of Lexington, Richmond, Irvine (Ravenna) or London. So the question remains, Does the Act include the appellant as being engaged in the "production or furnishing of natural gas

for the public of those cities *for compensation?*" The appellant receives no compensation from the public of any of those cities directly; if the Act is construed to mean remote compensation from the public through the distributor it would apply to every producer who delivers gas at the well head to gathering lines whence it flows to pipe lines and thence to city mains and to the public at the meter for consumption at the burner tip. To extend the Act beyond the necessities of the case (the regulation of service and rates to the public) so as to include price regulation of the entire range of production of gas would render it unconstitutional as an unwarranted invasion of private business. Every owner of land has a right to explore it for its mineral content or to lease the right to another for the purpose. Under such a construction no producer of gas could without the Commission's consent issue securities (sec. 4 (k) Ky. Stat. 3952-24); or even drill a well (sec. 4 (l); Ky. Stat. 3952-25).

The like is true of the Act in speaking of "any facility * * * for * * * the transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public for compensation." The transmission of gas from its own leases through its own lines no matter in what quantities or to what distances and though the gas be intended for sale to others for ultimate public consumption does not change the status of the transmitter from a private to a common carrier. *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 78-79; *Texoma Natural Gas Co. v. Railroad Commission*, (D. C. Tex.; three judges) *supra*, 752-753.

In the court below defendants' (appellees') counsel in their brief took the following rather startling position:

"* * * However, the defendants' jurisdiction and authority to regulate the complainant's rates

does not depend on whether or not the complainant's business is private or public, but depends on whether or not the complainant is a 'public utility' within the meaning of that term as defined by the Kentucky Legislature and contained in Section 3952-1 of the Kentucky Statutes."

The General Assembly of Kentucky, by its definition of a "utility" in sec. 1 of the Utilities Act (Ky. Stat. 3952-1), could not by mere legislative fiat convert a private enterprise into a public utility. Compare *Michigan Public Utilities Commission v. Duke*, *supra*, 577-578; *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101; and *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264.

If the appellees contend for an unconstitutional construction, they do so at their peril. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 74-76.

Perhaps in this Court, as in the court below, the appellees will cite the case of *State Tax Commission v. Petroleum Exploration*, 253 Ky. 119, 68 S. W. (2d) 777. That case involved the liability of the appellant for a so-called "franchise tax" under Ky. Stat. sec. 4077, quoted in the opinion therein. It will be noted from the opinion that the point was squarely raised that the statute applied only to a public utility and that the General Assembly could not by legislative fiat convert the appellant's private business into that status (p. 779). The court declined to decide the issue and was content to hold that the appellant was "performing a public service", within the meaning of the statute, and was, therefore, a "pipe line company" as therein defined (p. 780); but did not decide that it was a "public utility".

The opinion adverts to the fact that, whether exercised or not, operators of "oil or gas well or wells or

pipe line or lines for conveying, transporting or delivering oil or gas or both oil and gas" had been given the power of *eminent domain* "all such being hereby declared to be a public use" (pp. 778, 779). The General Assembly by such declaration could not convert a private business into a public utility. *Michigan Public Utilities Commission v. Duke, supra*; *Frost v. Railroad Commission, supra*, and *Smith v. Cahoon, supra*. *Eminent domain* is misused; it denotes a taking for *public use*. It has long been the law of Kentucky that proprietors of mines, quarries, oil wells, gas wells, timber tracts, *et cetera*, may condemn a *private* way over the lands of others to market their products. The taking is barely justified constitutionally, so the Kentucky Court of Appeals holds, by the fact that while the user by the original condemnor is private, others similarly situated may elect to exercise a similar use upon like terms, that is, making compensation. Such is the constitutional theory. However, the practical end to be gained is admittedly to permit such proprietors to conveniently transport their products to market. *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 104 S. W. 762, 764, 766; and *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 715, 109 S. W. 328, 331, 332.

State Tax Commission v. Petroleum Exploration is not pleaded as an estoppel or judgment in bar; nor could it be. Decided in 1934, it involved "franchise tax" assessments for the years 1932 and 1933. Contrary perhaps to the rule in most jurisdictions a Kentucky judgment of tax liability *vel non* is *res adjudicata* of the particular assessment only. It fixes no continuing status of any kind — either of liability or immunity — in either the federal or state courts. See *Covington v. First National Bank*, 198 U. S. 100, 107-109, 49 L. ed. 963; and the same case below, *First National Bank v. Covington*,

129 Fed. 792, 799-804, where the Kentucky decisions are cited, analyzed and construed.

Separability of Business.

That the appellant's wholesaling gas to its subsidiary may be affected with a public interest does not so affect its wholesaling to non-affiliates. A corporation may at the same time be engaged in business partly private and partly public. Compare *Santa Fe P. & P. Ry. Co. v. Grant Bros.*, 228 U. S. 177, 185, 57 L. ed. 787; *Terminal Taxicab v. Kutz*, *supra*, 256; *Puget Sound International Ry. & P. Co. v. Kuykendall*, *supra*, 793; *Chenery v. Employers' Liability Assur. Corp.* (9th C. C. A.), 4 Fed. (2d) 826, 827.

At the expense of repetition we emphasize that all gas flowing through the Lexington Line is produced by the appellant and disposed of to a non-affiliate, the Central. In the case of the Somerset Line the gas is disposed of in part to a non-affiliate, Edwards & Eversole, and the balance to appellant's subsidiary, the Peoples. All gas in the Knox County Lines is disposed of to the subsidiary.

In *Terminal Taxicab Co. v. Kutz*, the company secured the exclusive privilege of furnishing taxi service at Union terminal and some hotels and agreed to provide adequate service; it also furnished taxi service from its central garage on call, usually by telephone. The Public Utilities Commission of the District of Columbia sought to exercise jurisdiction over the company's business; and it sought injunction. This Court awarded an injunction "to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same". (p. 257).

The bill in this cause (R. 20-22) prays for relief against the investigation severally in respect of the price for gas fixed by each of the wholesale contracts.

Direct Regulation of Prices to Subsidiary.

Where there is an affiliation, as in this case between the appellant and the Peoples, a public utilities commission does have authority to inquire into the reasonableness of the wholesale price charged the subsidiary and to be allowed to it as an operating expense. However, the practice is to regulate the retail rates of the subsidiary distributor and not the wholesale price of the parent, for to do the latter would serve no useful purpose so far as the public is concerned. Were it not for the several franchise rate contracts entered into by the municipalities of Manchester, Somerset, Barbourville and Corbin, respectively, with the Peoples (a matter which will be presently discussed), we would concede the right of the Commission in a proceeding against the Peoples to regulate the rates at which it distributes gas in those municipalities and in so doing to fix as an operating expense the reasonable value of the gas delivered to it by the appellant, regardless of the wholesale contract price fixed therefor. But at most the Commission would be interested only in what the public of those municipalities pays for its gas and not in intercorporate transactions between the appellant and its subsidiary. Having fixed the latter's retail rates with due consideration as an operating expense of a reasonable allowance *only* for the gas which it procures from the appellant, the Commission's function would be performed. How the subsidiary, by means of the wholesale contracts, divides with the appellant the revenues derived by the subsidiary from the public, is a purely private intercorporate transaction for which the Commission cannot

substitute its judgment for that of the corporate directors. Compare *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 320-321, 73 L. ed. 390; and *Western Distributing Co. v. Public Service Commission*, *supra*, 123-125.

Validity of the Franchise Rate Contracts.

THE CONTRACT CLAUSE.

It is well settled by the decisions of this Court that a municipality, when authorized by the state, in a proprietary capacity on behalf of itself and its inhabitants, may fix rates by contract with a utility, for a time not unreasonable, and that a contract so made is within the protection of the contract clause of the United States Constitution and cannot during its term be impaired by subsequent rate-making legislation. Compare *Detroit v. Detroit Citizens' Railway Co.*, 184 U. S. 368, 382, 46 L. ed. 592; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 515-516, 51 L. ed. 1155; *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176; *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352, 359-360, 68 L. ed. 1050; and *Railroad Commission v. Los Angeles Railway Corp.*, 280 U. S. 145, 74 L. ed. 234, and the numerous cases therein cited and in the copious note to the decision as reported in the *Lawyers' Edition*.

"The general powers of a municipality * * * are not sufficient. Specific authority for that purpose is required." *Home Telephone & Telegraph Co. v. Los Angeles*, *supra*, 273. In determining whether or not a municipality has specific authority, this Court turns to the decisions, if any, of the state court. Compare *Vicksburg v. Vicksburg Water Works Co.*, *supra*, 515-516; *St. Cloud Public Service Co. v. St. Cloud*, *supra*, 359-360; and *Railroad Commission v. Los Angeles Railway Corp.*,

supra, 152. In the St. Cloud case it is held that the power to regulate is governmental, while the power to contract on behalf of the municipality and its inhabitants is proprietary (p. 359).

KENTUCKY CONSTITUTION.

Sections 163 and 164 of the Kentucky Constitution are as follows:

Sec. 163. "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith begun thereunder, the provisions of this section shall not apply."

Sec. 164. "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or *make any contract in reference thereto*, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway." (*Italics ours*).

While the language of sec. 164 is in the form of a limitation, it has been held by the Kentucky Court of Appeals in numerous cases that a grant is implicit therein, which is logical as the limitation in respect of time

and manner of granting and contracting necessarily implies the power to grant and contract. The court has held, to use its own language, that sec. 164 is "self operative" and "delegates" to a political subdivision power to grant a franchise.

JUDICIAL CONSTRUCTION.

Irvine Toll Bridge Co. v. Estill County (Oct. 9, 1925), 210 Ky. 170, 275 S. W. 634: In 1909, the fiscal court of Estill county sold a franchise for the erection and operation of a toll bridge across the Kentucky river at a point convenient to public travel between Richmond and Irvine. The bridge was duly erected "and from that time on it was operated under the toll charges fixed in the resolution authorizing the sale of the franchise." The authority of the fiscal court to grant the franchise having been questioned, the court said:

"We have been cited to no statute, nor have we been able to find one *expressly* conferring upon a county or any other subdivision or agency of the state the right to grant a franchise to construct and maintain a toll bridge, or any other franchise affecting highways or bridges, except 'Ferry privileges', and the statute pertaining to granting of franchises to operate ferrys was enacted long before the adoption of our present Constitution, and its section 164 says (S. W. 636) :

"(* * * *

"And it was held in the case of *Christian-Todd Telephone Co. v. Commonwealth*, 156 Ky. 567, 161 S. W. 543, and numerous other cases cited in the notes to that section as published in the 1922 edition of Carroll's Statutes, that the provisions of the section were self-operative and conferred upon the counties and municipalities authority to grant franchises pertaining to subjects of which they were given

jurisdiction. *In other words, the cases referred to hold that such political subdivisions of the state were delegated the power by the provisions of that section to grant franchises with reference to proper subjects in their territory of which they were given supervisory jurisdiction by the laws of the state. (Italics ours; ib.)*

“* * * But when we consider that section 164, *supra*, of the Constitution has been construed to be self-operative, then it necessarily applies to all subjects of which the fiscal court has the acquired jurisdiction, unless some other particular one has been especially provided for, as is true with reference to ferries. There was no statute authorizing the sale of a franchise to a telephone or other public utility company at the time the Christian-Todd Telephone Company Case, *supra*, was decided; nor is there any such statute now, so far as we have been able to find; but, because of the self-operative provisions of section 164 of the Constitution, it was held that the fiscal court, not only could grant such franchises, but that the method pointed out in the section was the only one to be followed. * * *” (S. W. 637).

The case of a municipal gas franchise rests upon still firmer ground. See sec. 163 of the Constitution above quoted. If as stated sec. 164 without more delegated power to grant a franchise, then by like reasoning it delegated power “to make any contract in reference thereto” as the section expressly mentions; and in the Irvine Toll Bridge case the franchise so granted did fix the bridge tolls, which received the court’s approbation. No more appropriate subject for a contract in reference to a franchise than rates can be suggested (*Detroit v. Detroit Citizens Street Railway Co.*, *supra*, 384); and

the Kentucky Court of Appeals in numerous decisions has held that sec. 164 does authorize a rate contract.

In *Moberly v. Richmond Telephone Company* (June 28, 1907), 126 Ky. 369, 103 S. W. 714, the court said:

"* * * The franchise was granted by the city for the term of 20 years, to occupy its streets, alleys, etc. In the ordinance granting it, it was provided that the grantee should not charge exceeding the schedule of rates fixed in the ordinance for service to the citizens of Richmond. * * *"

"Under the present Constitution a city may sell such franchises at public sale to the highest and best bidder for a term of not exceeding 20 years, though they are not exclusive. Without such sale cities may not grant such franchises. Section 164, Const. The city may annex any lawful condition to be exercised with the franchise, which becomes a part of the contract under which it is thenceforth used. And we think it was competent for the city to provide, as a condition to the franchise, that the rates to citizens should not exceed the schedule fixed in the ordinance, or any future ordinance. * * *"

In *Louisville Home Telephone Company v. City of Louisville* (Nov. 20, 1908), 130 Ky. 611, 113 S. W. 855, the court said:

"* * *
"A municipality has the power and right to erect, maintain, and operate plants, and use the public streets for furnishing such utilities for the municipality itself and to its inhabitants. Such power or duty it may discharge by having others perform them for it upon such terms as may be agreed upon in the form and manner prescribed by law. What, therefore, is commonly termed the 'granting' of a franchise by a city for one of these

*public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. * * ** From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or procuring the service of such utilities, is * * * the securing of good and efficient service, and *upon such terms as will in the judgment of the city's governing body, promote the greatest good, * * * to the entire community, * * *.*" (Italics ours; S. W. 861).

Compare *St. Cloud Pub. Serv. Co. v. St. Cloud*, *Supra*, 359.

In *City of Louisville v. Louisville Home Telephone Co.* (June 21, 1912), 149 Ky. 234, 148 S. W. 13, the city had granted the company in 1900 a telephone franchise, fixing rates and banning party lines. Notwithstanding, in 1909, the company commenced using such lines though of a modified nature from those in use in 1900. The city sought an injunction; the court below denied it; but the Court of Appeals awarded it. The latter said:

"By section 9 of the ordinance, it was provided in part: 'There shall be no party lines constructed or maintained by the owner or company operating such telephone system or plant. * * *' (S. W. 14).

"* * *

"* * * Section 9 of the ordinance fixes the rates which appellee may charge and those rates it is entitled to charge for the service it renders, irrespective of whether that service is single line or party line service. * * * (*ib.*).

"* * *

"* * * It is sufficient that the condition contained in the ordinance, under which it acquired the franchise, prohibits it from constructing or maintaining party lines in the conduct of its business.

The condition is therefore a part of its contract with the city; and if the city insists upon its compliance with that condition appellee can be compelled by the courts to do so, even if the result should be the loss to it of the profits it has been accustomed to realize from its business." (S. W. 16).

In *Lutes v. Fayette Home Telephone Co.* (Oct. 29, 1913), 155 Ky. 555, 160 S. W. 179, involving the amendment of a rate contract, after quoting section 164, of the Kentucky Constitution (S. W. 182) the court said:

"This is not a case where the municipality is undertaking to change the provisions of a contract against the will of the other contracting party. *In cases of that character it is universally held that the contract cannot be changed, since to do so would impair its obligation.* * * *" (S. W. 183).

By the time of the decision of *Paducah v. Paducah Railway Co.* (Feb. 19, 1923), 261 U. S. 267, 67 L. ed. 647, the authority of a Kentucky municipality to contract with a utility fixing rates was so well established that it was conceded. This Court said:

"That the city had power under its charter to prescribe just and reasonable fare from time to time was stated by counsel on the argument and is assumed. * * * (p. 272).

"* * *

"On the argument, it was stated by counsel that the city and company have power to contract as to rates, and we so assume. If the franchise here amounts to a contract binding the company to the fare stated therein as a maximum, as claimed by the city, for the whole franchise term of twenty years, it cannot complain, and there is no ground for relief; and the question whether such rates are too low to give a reasonable return or sufficient is immaterial." (pp. 272-273).

As in the Paducah case, so in this case, counsel for the defendants concede that a municipality has authority under sec. 164 to enter into a rate contract with a municipality. In their answer the defendants expressly admit that all of the franchise rate contracts were, as averred in the bill of complaint, entered into between the municipality and the distributing utility "pursuant to said section 164" (R. 6-11, 47-53); and the court below expressly so found (R. 84-85):

"(10) The gas sold and delivered under each of the several contracts above mentioned is distributed by the purchaser to the public in the municipality at which it is delivered (save that gas delivered at Irvine is distributed to the public therein and also in Ravenna, adjacent thereto), pursuant to a franchise sold and granted by the municipality under authority of section 164 of the Kentucky Constitution to the distributor or its predecessor for a valuable consideration; and in each instance the municipality, under authority of said section 164, in reference to the franchise, and as parcel thereof (except in the case of Lexington, by separate instrument), in its proprietary capacity, entered into a contract with the grantee fixing the rates to be charged by the grantee and his/its assigns for gas distributed in the municipality pursuant to the franchise and effective during the term thereof. Save the separate rate contract for Lexington, which expires March 1, 1939, the said franchises have from nine years upward yet to run."

However, the answer seeks to imply as a matter of law that such contracts were entered into "subject to modification and regulation by a regulatory agency of the Commonwealth of Kentucky created and empowered by subsequent legislation" (R. 47-53). The franchise rate contracts contain no such provision (R. 26-39, 40).

The power to fix rates by regulation on the one hand and by contract on the other are not destructive of each other so long as the latter power is not exercised; but when it is and rates are so fixed by contract pursuant to proper authority (in this case expressly admitted) the power to fix by regulation is necessarily suspended for the term of the contract. *St. Cloud Public Service Co. v. St. Cloud*, *supra*, 360:

"* * * and where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended and the contract is binding. *Paducah v. Paducah R. Co.*, 261 U. S. 272, 273, 67 L. ed. 650."

"* * * And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. (Citation). And in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates however inadequate they may prove to be. (Citation)."

Railroad Commission v. Los Angeles Railway Corp., *supra*, 152.

In *Union Light, Heat & Power Co. v. Railroad Commission* (Oct. 14, 1926), 17 Fed. 2d 143, 148, the court below, three judges sitting, held:

"* * * These two sections of the Constitution (163 and 164) took away from the General Assembly the power to grant local franchises, and expressly vested that power in the municipalities of the state. * * *" (Parenthetical interpolation ours).

In *City of Ludlow v. Union Light, Heat & Power Co.* (December 3, 1929), 231 Ky. 815, 22 S. W. (2d) 909, the Kentucky Court of Appeals followed that decision, in the course of an elaborate opinion, saying:

"* * * but the use of the streets of the city and the granting of franchise rights therein is vested in the municipality by the plain provision of section 164 of the Constitution * * *"

"* * * It (the court below in 17 Fed. (2d) 143) also held that the construction of the act contended for by the city, namely, that the Railroad Commission has the power to compel and regulate service within the municipality would be in effect to say that the General Assembly had the right to confer upon the Commission the power to set aside the mandatory constitutional provisions of sections 163 and 164, which took away from the Legislature the power to grant local franchises and expressly vested that power in the municipality." (S. W. 911; parenthetical interpolation ours).

In the *City of Campbellsville v. Taylor County Telephone Co.* (June 4, 1929), 229 Ky. 843, 18 S. W. (2d) 305, the city, pursuant to section 164 of the Kentucky Constitution, sold a telephone franchise to the company in July, 1920, which fixed the rates for service. Of this the court said:

"* * * It was proper for the franchise to provide the conditions under which, and the rates for which, the service should be rendered. * * *"
(S. W. 308).

In *Kentucky Utilities Co. v. City of Paris* (Feb. 17, 1931), 237 Ky. 488, 35 S. W. (2d) 873, the city, in March, 1913, sold a 20-year gas franchise to the company's predecessor, fixing a minimum rate of 35¢ per Mcf net and a maximum rate of 55¢ gross, less 5¢ for prompt

payment, that is, 50¢ net. At that time, a 35¢ net rate was in force in Lexington, Winchester and Mt. Sterling. The franchise further provided that "when an increase in the rates is made at any time in those cities, a similar increase shall become effective and operative in Paris". The franchise in those cities having been granted in 1905 expired in 1925 and a controversy over new franchise rates having arisen and litigation having ensued, by an agreed order a 50¢ rate was made temporarily effective, of which 10¢ was to be impounded pending the fixation of a permanent rate in those cities. Thereupon, the company put in effect a like rate in Paris, that is 50¢, of which 10¢ was impounded. This suit, which was brought for the purpose of recovering the impounded fund and preventing the company from charging in excess of 40¢, was dismissed. The court said (S. W. 874):

"The question is whether the rate increases made in the manner and under the conditions stated in Lexington, Mt. Sterling and Winchester justify the appellant in making a similar increase in Paris. *The franchise constitutes a contract and its obligations are binding upon both parties.*" (Italics ours).

The Lexington rate contract involved herein (R. 27-31) has been before both the Kentucky Court of Appeals and this Court; and by both affirmed.

Of it, in *Central Kentucky Natural Gas Company v. City of Lexington (same v. Wright)* (June 7, 1935), 260 Ky. 361, 85 S. W. (2d) 870, the Court of Appeals said:

"The point for our consideration, therefore, may be narrowed down to a determination of whether or not section 2 of Resolution 74 in effect, if not in fact, fixed a rate. If it did, we are not concerned with the policy or wisdom of the ordinance

* * * the matter was one entirely between the gas company and the city. * * * (S. W. 872).

"It follows from what we have said that both Resolution 74 and Ordinance 271 enacted pursuant thereto are valid as contracts and could not be repealed as attempted, and that it is the plain duty of the public agencies concerned to lend every effort to bring this long-pending litigation to an end." (S. W. 873).

Of it, the Lexington rate contract, in *Wright v. Central Kentucky Natural Gas Co.* (March 16, 1936), 297 U. S. 537, 542, 80 L. Ed. 850, this Court said:

"The case comes here on appeal. Appellants, consumers of gas, contend that the obligations of the original franchise contract have been impaired by the attempted compromise in violation of the contract clause of the Federal Constitution and that appellants have been deprived of vested property rights in the impounded fund without due process of law contrary to the Fourteenth Amendment. On examining the franchise contract and the proceedings for the impounding of amounts collected from consumers * * * we find no warrant for a conclusion that appellants had any vested right which precluded the city from effecting a reasonable adjustment of the controversy over rates and from entering into a contract fixing a reasonable rate for the period during which the fund was impounded as well as for the future. * * * In making that settlement, as well as in the making of the original franchise contract, the consumers were represented by the city. * * *"

LEGISLATIVE CONSTRUCTION

By *Ky. Stat.*, sec. 201 e-1 (1920, c. 61), printed in the appendix, the jurisdiction of the Railroad Commission was enlarged to include "telephone", "telegraph", "natural gas" and "steamboat" companies and other companies engaged in the business of intrastate water transportation, transmission of messages and distribution of natural gas. Of these only "telephone" and "gas" companies were among the utilities enumerated in section 163 of the Kentucky Constitution, that is, "street railway, gas, water, steam heating, telephone, or electric light company". Accordingly, the General Assembly was at pains to make the following exception in 201 e-1:

"* * * nor shall the provisions of this act apply to any telephone or gas company operating in any municipality under a franchise or contract fixing or regulating the rates which said company, may charge, or the terms and conditions under which such company is operating; * * *"

This of itself was a legislative construction of sections 163 and 164 of the Kentucky Constitution and plain admission that the General Assembly conceived itself to be without power to trench upon the exclusive constitutional authority of a municipality to grant a gas or telephone franchise and make a contract fixing the rates to be charged.

UTILITIES ACT AND OBITER DICTA

It is, therefore, difficult to perceive how it can be doubted that secs. 163 and 164 of the Kentucky Constitution, as construed and applied in the divers decisions above cited and quoted (and more could be added), authorize a municipality in preference to a gas franchise

to make a contract fixing rates. None the less, after having expressly excluded from the regulatory power of the Railroad Commission gas rates fixed by municipality-utility franchise rate contract, in obvious deference to said secs. 163 and 164, the General Assembly did an "about face" in 1934 and undertook, by the Utilities Act (sec. 4 (n); *Ky. Stat.* 3952-27), to take from municipalities their constitutional power to fix rates by contract made in reference to a franchise; and to make such contracts theretofore entered into subject to the rate-making jurisdiction of the Commission.

Recently, June 20, 1936, upon review by a single Justice of the Court of Appeals, of an interlocutory order, overruling a motion to dissolve a temporary injunction, as permitted by the Kentucky practice, the Justice, in his opinion, discussed the constitutionality of sec. 4 (n) *obiter dictum*. *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 265 Ky. 286, 96 S. W. (2d) 695.

No rate contract was involved. The facts as stated in the opinion were as follows:

"This case is before me on a motion made by the defendant, the city of Louisville, to dissolve a temporary injunction granted by the circuit court enjoining the city from enforcing an ordinance which provides for reduction of plaintiff's rates for local exchange telephone service within the city of Louisville. (S. W. 696).

"* * *

"* * * The plaintiff is the owner of a franchise granted by the General Assembly of Kentucky to the Ohio Valley Telephone Company on April 3, 1886. In 1924 this franchise was owned by the Cumberland Telephone & Telegraph Company, and in that year a consolidation of its properties and

the properties of the Louisville Telephone Company, which operated a competing telephone exchange in Louisville pursuant to a franchise granted by the city, was effected with the consent of the city in accordance with the provisions of section 201 of the Constitution. The ordinance in which the city gave its consent to the consolidation provided for certain rates to be charged by the plaintiff for a specific period, *which has long since expired*, and it further provided that such rates should be revised from time to time at the instance of the company or the city. * * * (Italics ours; S. W. 697).

The Justice stated his conclusions of law on the facts so actually involved, as follows:

"As I view the case, a correct decision of the question presented hinges upon the effect to be given to the Public Service Commission Act of 1934 as it relates to the right, if any, which the city of Louisville theretofore had to regulate plaintiff's telephone rates. * * * (S. W. 696).

"* * * The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power. * * * (S. W. 697).

"* * * The power to regulate rates had been delegated to the city by the Legislature, and what it had given it could take away. The act of 1934 which created the Public Service Commission divested the city of the power to regulate rates and reposed that power in the commission." (S. W. 698).

The motion to dissolve was overruled. However, the learned Justice continued:

"* * * I find nothing in section 164 of the Constitution indicating that the state has been deprived of the right to exercise this power (rate regulation), and, that being true, a *franchise* granted by a municipality is granted subject to the right of the state to exercise its police power in this respect." (Parenthetical interpolation and italics ours; S. W. 697).

This, of course, is quite true so long as no more than a franchise is granted, and no rate contract in reference thereto exists. Of such a contract the Justice further continued (*ib.*):

"* * * A municipality may be granted the power to make irrevocable contracts as to rates and the exclusive power of regulation either by constitutional provision or legislative enactment, but the presumption that such a surrender of power has been made will not be indulged unless the grant is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted."

But as we have seen the Kentucky Court of Appeals has repeatedly held that sec. 164 of the Kentucky Constitution does grant the power to enter into a rate contract in reference to a franchise. The Justice continued further thus:

"At the time the 1924 ordinance was enacted the plaintiff was not operating under a franchise granted to it by the city under sections 163 and 164 of the Constitution. The city could contract with plaintiff under its then existing franchise relative to rates. * * * (S. W. 698).

"* * *

"Conceding that the ordinance of 1924 constituted a contract which was binding on the parties

to the extent that it fixed specific rates for a definite period and that its obligations could not be impaired in that respect by legislative enactment, the only provisions of the ordinance involved in this proceeding are those relating to regulation of rates after the expiration of the fixed period. * * * (S. W. 698)

While to us rather puzzling, we fail to perceive wherein this opinion in any wise detracts from the authority of a municipality to enter into a binding rate contract with a utility in reference to a franchise as so often before held by the Court of Appeals sitting *in banc*, many of the decisions of which are cited and quoted above. The Justice cites a number of decisions, an analysis and differentiation of which would further unduly encumber this brief. The solution of the question lies in the distinction made in the above quoted provision from the *Home Telegraph & Telephone Co. v. Los Angeles* case (quoted with approval in *Railroad Commission v. Los Angeles Railway Corp.*, *supra*, 153) between "general powers" and "specific authority". Many cases turn upon the absence of "specific authority". Many others hold that a rate contract made under "general powers" while subject to subsequent rate regulation, is binding meanwhile. Still others hold that where the "specific authority" of the municipality is derived from the legislature as a governmental agency of legislative creation, the legislature, standing so to speak in the relation of principal to agent, may, by itself or through some other lawfully delegated authority alter the rate structure *at the request of the utility*. But there is no case, that we have found, holding that where the municipality has specific authority whether express or necessarily implied, the rate contract may be changed without the utility's consent. In particular compare the quotation

from Lutz v. Fayette Home Telephone Co., *supra*. In the instant case the municipal authority is derived not from the legislature, but from the Constitution.

The Justice further recites that all members of the court except the Chief Justice sat with him on the hearing of the motion and all concurred "in the view that the motion to dissolve the temporary injunction should be overruled", but not, so far as recited, in the *obiter dictum*.

In any event such a decision by a single justice even though others sat with him on the hearing lacks the quality of *stare decisis*, *res adjudicata* and "the law of the case". Compare *Gray v. R. J. Reynolds Tobacco Co.*, 200 Ky. 47, 252 S. W. 134, 135-136, headnote 3:

"An opinion by a judge of the Court of Appeals, who has associated with himself three other judges, on a motion to dissolve a temporary injunction, is not necessarily a precedent nor binding upon the Court of Appeals, though it may be considered for whatever persuasive effect it may have."

In *Smith v. Southern Bell Telephone & Telegraph Co.*, (May 11, 1937), *supra*, the Court of Appeals *obiter dictum* quoted in part the *obiter dictum* from *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, including some of the text of sec. 4 (n) of the Utilities Act. No contract, rate or otherwise, was involved. The facts in the case as stated in the opinion (S. W. 961-962) were:

"W. Taulbee Smith, circuit court clerk of Pike county, Ky., sued the Southern Bell Telephone & Telegraph Company, doing business in Pikeville, Pike county, Ky., to compel it to furnish service to his public office in the following manner:

“(1) Telephone service confined to Pikeville exchange, with no toll calls either inbound or outbound, or

“(2) Both exchange and toll service,—exempting him, however, from liability for tolls on inbound or outbound calls unless the Telephone Company shall first make sure that plaintiff consents to pay tolls on such calls.’”

“LAW” UNDER CONTRACT CLAUSE.

In any event, such decisions, even in a proper case, construing sec. 4 (n) of the Utilities Act (Ky. Stat. 3952-27), and under the compulsion thereof, would become part of the statute which as so construed would be a law within the meaning of the contract clause and could not impair the obligation of a contract. Compare *Los Angeles v. Los Angeles Water Company*, 177 U. S. 558, 575, headnote 2, 44 L. ed. 886; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 452-453, 68 L. ed. 382; and *Peoples Banking Co. v. Sterling*, 300 U. S. 175, 182-183, headnote 2, 81 L. ed. 586.

Due Process.

While the appellee's answer (R. 60) denies that “it is the obvious purpose of the said Commission to attempt to lower some or all” of appellant's wholesale prices, the fact remains that, as stated above, it was the obvious purpose of the Commission not to raise any or all of such prices as none of the distributors is made party to the investigation. Furthermore, the answer (*ib.*) avers “that the purpose of the said Commission in instituting and conducting said investigation and proceeding was to determine a fair and reasonable price or rate to be charged by the complainant pursuant to the aforesaid contracts, and to fix said price or rate” and (R. 61) “that

any reduction of any of the said prices so charged by the complainant to the respective distributors for said gas so sold and delivered would be in the public interest and would accrue to the consuming public through other and *subsequent* regulatory action by the said Commission" (Italics ours).

Therefore, if it reduces the appellant's wholesale prices the Commission proposes to pass the reduction on to the public by "subsequent" regulatory action. When? Meanwhile who pockets the reduction? Also, as we have seen, the Commission is without constitutional power to regulate the franchise contract rates of the distributors; and it has made no effort so to do. Hence the distributors would pocket any such reduction from now on.

"* * * There is here no taking for the public benefit; nor is payment of compensation provided. * * *" (p. 78).

"Our law reports present no more glaring instance of the taking of one man's property and giving it to another. * * * And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. * * *" (pp. 79-80).

Thompson v. Consolidated Gas Utilities Corp.,
supra.

Equally offensive to the due process clause is the Commission's mandate (R. 15, 57) to the appellant to "submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable" or "present evidence, if any it can, as will show conclusively the fairness of its present rates and charges for gas which it is selling to companies that are in turn selling the same at wholesale or retail

in this state", from the performance of which no one would derive benefit though it would cost the appellant \$21,500.00 and up to make compliance, for reimbursement of which the appellant could not look to the Commission, the public, nor the appellant's buyers.

Respectfully submitted,

EDWARD C. O'REAR and
ALLEN PREWITT of
Frankfort, Kentucky,

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For the Appellant.

APPENDIX.**KENTUCKY STATUTES.****Duties of Railroad Commission in Relation to Carriers.****§ 201e-1. *Character of carriers subject to the act.*—**

The provisions of this act shall apply to express companies, telephone companies, telegraph companies, natural gas companies and natural gas transportation companies, steamboats and steamboat companies, and all boats and other water craft propelled by the use of oil, gasoline or other means, whether incorporated or unincorporated and doing business in this State in the transportation of goods for hire or compensation between points in this state, or in receiving or transmission of messages between points in this state, or in the distribution furnishing or sale of natural gas as a fuel for domestic or industrial purposes, but the provisions of this act shall not embrace the operation of telephone companies within any city where the rates charged for the transmission of messages and other services may be regulated by local authority, or in the operation of natural gas companies in any city where the rates are now or may be regulated by local authority; nor shall it embrace any telephone company that is operated only in three or less counties; except for the purpose of making joint rates, nor any telephone company which has a capital stock of less than two thousand dollars, if incorporated, or if unincorporated tangible property of less value than two thousand dollars except for the purpose of making joint rates; nor shall the provisions of this act apply to any telephone or gas company operating in any municipality under a franchise or contract fixing or regulating the rates which said company may charge, or the terms and conditions under which such company is operating; and every express company, telephone company,

telegraph company, natural gas company, gas transportation company, steamboats, and steamboat company, shall furnish reasonably adequate service and facilities and the charge made for any service rendered or to be rendered in the transportation of messages by telephone or telegraph, or in the distribution, furnishing or sale of natural gas by any company, or for any service in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service, and every unreasonable rule, regulation or practice is hereby prohibited and declared to be unlawful. (1920, c. 61, p. 250, § 1.)

Utilities Act.

§ 1. (Ky. Stat. 3952-1) *Definitions.*

(a) The term "corporation", when used in this act, includes private, *quasi* public and public corporations, an association, a joint stock association, or a business trust.

(b) The term "person", when used in this act, includes a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "utility" or "utilities", when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter own, control, operate or manage (one) any facility used or to be used for or in connection with the generation, production, transmission or distribution of electricity to or for the public for compensation for lights, heat, power or other uses; (two) any facility used or to be used for or in connection with the production, manufacture, storage distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be

used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; (four) any facility used or to be used for or in connection with the diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation; (five) any facility used or to be used for or in connection with the transmission or conveyance over wire, in the air or otherwise, of any message either by telephone or telegraph for the public for compensation; (six) any facility used or to be used for or in connection with the transportation of persons or property by street, suburban or interurban railways for the public for compensation: Provided, however, that for the purposes of this act the term "utility" or "utilities" shall not mean or include any city or town or water districts established in pursuance of Chapter one hundred thirty-nine (139).

(d) The term "facility" or "facilities", when used in this Act, shall be construed in its broadest and most inclusive sense and shall include all property, real, personal, tangible and intangible, and all other means and instrumentalities in any manner, owned, operated, leased, licensed, or used, furnished or supplied for, by, or in connection with the business of any utility.

(e) The term "rate", when used in this Act, shall mean and include the plural number as well as the singular, and every individual or joint rate, fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, fare, toll, charge or other compensation, and any schedule or tariff, or part of a schedule or tariff thereof.

(f) The term "service", when used in this Act, is used in its broadest and most inclusive sense, and includes every practice or requirement in any way re-

lating to the service of any utility, including the voltage of electricity; the heat units, the pressure of gas; the purity, pressure and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility.

(g) The term "commission", when used in this Act, shall refer to and mean the Public Service Commission of Kentucky, unless otherwise indicated.

(h) The term "commissioner", when used in this Act, shall mean one of the members of the commission.

§ 2. *Public Service Commission Created.*

(a) (Ky. Stat. 3952-2) For the purpose of regulating certain utilities and of carrying out the provisions of this act, an administrative body or commission is hereby established, to be known as the "Public Service Commission of Kentucky", which is hereby declared to be a body corporate with power to sue and be sued, and in its corporate name, as above designated, to adopt a corporate seal bearing the following inscription: "Public Service Commission of Kentucky", which seal shall be affixed to all writs and officials documents, and to such other instruments as the commission may direct. All courts shall take judicial note of said seal.

§ 3. *Officers and Employees.*

§ 4. *Powers and Duties of the Commission.*

(a) (Ky. Stat. 3952-12) *Jurisdiction.* The jurisdiction of the commission shall extend to all utilities in this commonwealth as enumerated in Section 1 of this act.

(b) (Ky. Stat. 3952-13) *General Powers of the Commission.* The commission is hereby given power to investigate all methods and practices of such utilities to require them to conform to the laws of this common-

wealth, and to all reasonable rules, regulations, and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications and schedules in effect and used by such utilities to be filed with the commission, and also other information desired by the commission relating to any investigation or requirement. Provided, however, that the commission shall have no jurisdiction over rates that are now the subject of litigation before the Railroad Commission or in any court between any utility and any municipality of the State until after the expiration of two (2) years from the entry of final order in said litigation. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, or vacated in whole or in part by order or decree of a court of competent jurisdiction.

(c) *Powers of the Commission with Respect to Rates.*

(1) (Ky. Stat. 3952-14) *Generally.* Whenever the commission after a hearing had upon reasonable notice, upon its own motion or upon complaint, as provided in Section 6 (a) of this act, finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commission shall by order require just and reasonable rates, joint rates, fares, tolls or schedules to be followed in the future in lieu of those found to be unjust,

unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act.

* * * * *

(e) (Ky. Stat. 3952-18) *Service, Equipment, Facilities to be Fixed by the Commission.* Whenever the commission, after a hearing upon reasonable notice had upon its own motion or upon complaint as provided in Section 6 (a) of this act, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any utility, or the method of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced or employed, and shall fix the same by its order, rule or regulation. The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any utility, and, on proper demand and tender of rates, such utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

(f) (Ky. Stat. 3952-19) *Valuation.* The commission may on hearing, after reasonable notice, ascertain and fix the value of the whole or any part of the property of any utility in so far as the same is material to the exercise of the jurisdiction of the commission, and make revaluations from time to time and ascertain the value of all new construction, extensions, and additions to the property of such utility. In arriving at a valuation of property of any utility as provided in this Section, the commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern.

and other elements of value recognized by the law of the land for rate making purposes. Provided, the right of the commission to value and revalue the property of any utility shall not be exercised unless same is necessary or advisable to determine the legality or reasonableness of any rate, service or issuance of any security or securities, and then only after an investigation affecting same has been instituted by the commission or upon complaint or application.

* * * * *

(i) (Ky. Stat. 3952-22) *System of Accounts*. The commission may establish a system of accounts to be kept by utilities or may classify utilities and establish a system of accounts for each class and prescribe the manner in which such accounts shall be kept. Provided, the system shall as nearly as may be consistently possible conform to the Uniform System of Accounts as prescribed by the National Association of Railway and Utilities Commissioners, except that the system to be established for telephone and telegraph companies shall conform as nearly as practicable to the system adopted or approved by the Interstate Commerce Commission, or other Federal regulatory body, for the said telephone and telegraph companies.

(j) (Ky. Stat. 3952-23) *Records and Reports*. The books, accounts, papers and records of every utility shall be available to the commission for inspection and examination. If said books, accounts, papers and records are not within the state, the commission may by notice and order require the production of same or, at its option, verified copies in lieu thereof, at such time and place as it may designate, so that an examination may be made by the commission. Provided, in the latter instance any expense incurred shall be borne by the utility so ordered. Every utility, when and as required by the commission, shall file with the commission

such annual or other reports or information as the commission shall reasonably require. The commission shall prepare and distribute to such utilities blank forms for any information required under this act. All such reports shall be under oath when required by the commission.

(k) (Ky. Stat. 3952-24) *Issuance of Securities; Issuance or Guarantee of Securities by the Utility.* From and after one hundred and twenty days after the appointment and qualification of the three commissioners herein provided for, no utility shall issue any securities, notes, bonds, stocks or other evidence of indebtedness, or assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise in respect to the securities, notes, bonds, stocks or other evidence of indebtedness, of any other person or corporation unless and until, and then only to the extent that, upon application by the utility, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities, notes, bonds, stocks or other evidence of indebtedness, of any other person, or corporation, the commission, by order, authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility; (b) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service; and (c) is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify that such securities, notes, bonds, stocks or other evidence of indebtedness, or the proceeds thereof, shall be used only for the lawful purposes, as specified in the application, of such utility.

The commission shall have power by its order to grant or deny the application, provided for in the preceding paragraph hereof, as made, or to grant it in part, or deny it in part, or to grant it with such modification and upon such terms and conditions as the commission may deem necessary or appropriate in the premises.

Every application for authority for such issue or assumption shall be made in such form as the commission may prescribe. Every such application and every certificate of notification hereinbefore provided for, shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the utility.

Nothing herein shall be construed to imply any guarantee or obligation as to such securities, notes, bonds, stocks or other evidence of indebtedness, on the part of the state of Kentucky.

The provisions of this act shall not apply to notes issued by a utility for proper purposes and not in violation of law, payable at periods of not more than two years from the date thereof, and shall not apply to like notes issued by a utility, payable at a period of not more than two years from the date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes, and shall not apply to renewals thereof from time to time, not exceeding in the aggregate, six years from the date of the issue of the original note or notes so renewed or refunded. Nothing contained in this act shall be construed as limiting the power of any court having jurisdiction to authorize or cause receivers' certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity.

The commission may require periodical or special reports from each utility hereafter issuing any security, notes, bonds, stocks, or other evidence of indebtedness, which shall show in such detail as the commission may require, the disposition made of such securities, notes, bonds, stocks, or other evidences of indebtedness, and the application of the proceeds thereof.

Securities, notes, bonds, stocks, or other evidence of indebtedness issued, and obligations and liabilities assumed by a utility, for which, under the provisions of this act, the authorization of the commission is required, shall not be contrary to any term or condition of such order of authorization entered prior to such issuance or assumption. Securities, notes, bonds, stocks, or other evidence of indebtedness issued, or obligations or liabilities assumed, in accordance with all the terms and conditions of the order of authorization therefor, shall not be affected by a failure to comply with any provision of this act or rule or regulation of the commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. A copy of any order made and entered by the commission as provided in this act, duly certified by the secretary of the commission, approving the issuance of any securities, notes, bonds, stocks or other evidence of indebtedness, or the assumption of any obligation or liability by a utility, shall, in and of itself, be sufficient evidence for all purposes of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. Any utility which issues any such securities, notes, bonds, stocks or other evidence of indebtedness, or assumes any such obligation or liability, or makes any sale or other disposition of securities, notes, bonds, stocks or other evidence of indebtedness, or the proceeds thereof, for purposes other than

the purposes specified in the order of the commission with respect thereto, shall be liable to a penalty of not more than ten thousand (\$10,000.00) dollars, but such utility is only required to specify in general terms the purpose for which any securities, notes, bonds, stocks, or other evidence of indebtedness, are to be issued, or for which any obligation or liability is to be assumed and the order of the commission with respect thereto shall likewise be in general terms. The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties or employment, shall for the purpose of this section be deemed to be the willful act of the utility. All applications for the issuance of securities, notes, bonds, stocks or other evidence of indebtedness or assumption of liability or obligation shall be placed at the head of the commission's docket and disposed of promptly, and all such applications shall be disposed of in sixty days after the same are filed with the commission, unless it is necessary for good cause to continue the same for a longer period for consideration, whenever such application is continued beyond sixty days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. Provided, the provisions of this section shall not apply in any instance where the issuance of such securities, notes, bonds, stocks or other evidence of indebtedness are subject to the supervision or control of the Federal government or any agency thereof. However, where an application is filed or is pending before the Federal government, or any agency thereof, the commission may, in its discretion, appear as a party to the proceeding if the issuance of such securities by the Federal government or any agency thereof, will materially affect any utility over which the Commission has jurisdiction.

(1) (Ky. Stat. 3952-25) *Public Convenience and Necessity*. No utility, person or corporation shall begin the construction, of any plant, equipment, property or facility for furnishing to the public any of the services enumerated in Section 1 of this act, except ordinary extensions of existing systems in the usual course of business, unless and until it shall have obtained from the commission a certificate that public convenience and necessity require such construction. Upon the filing of any application for such a certificate, and after a public hearing of all parties interested, the commission may, in its discretion, issue or refuse to issue, or issue in part and refuse in part, such a certificate of convenience and necessity. Unless exercised within a period not exceeding one year from the grant thereof, exclusive of any delay due to the order of any court or to failure to obtain any grant or consent, the authority conferred by the issuance of the certificate of convenience and necessity shall be null and void, but the beginning of any new construction or facility in good faith, within the time prescribed by the commission and the prosecution of the same with reasonable diligence, shall constitute a compliance with such certificate. Any person or group of persons may come before the commission and by petition ask that any utility be compelled to make any reasonable extensions, and the commission shall proceed to hear and determine the reasonableness of such an extension and whether the petition should be sustained either in whole or in part.

No utility shall henceforth exercise any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted, the exercise of which has been voluntarily suspended or discontinued for more than one year, without first obtaining from the commission a certificate that public convenience and necessity require the exercise

of such right or privilege. Further, no utility shall, from the time this act becomes effective, apply for or obtain any franchise, license or permit from any municipality, or other governmental agency, until the commission has granted to the said utility a certificate of necessity and convenience showing that there is a demand and need for the service sought to be rendered.

All carriers or conveyors of electricity or electric power are hereby declared to be common carriers and subject to the obligations incident thereto.

* * * * *

(n) (Ky. Stat. 3952-27) *Authority of the Commission to Change Contract Rates.* The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and promulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise, between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules, or service standards, shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed, nor any contract or agreement affecting same shall be abrogated or changed until and after a hearing has been had before the commission in the manner prescribed in this act.

Nothing in this section or elsewhere, in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.

§ 5. *Duties and Privileges of Utilities, Subject to the Regulation of the Commission.*

(a) (Ky. Stat. 3952-28) *Rates.* It shall be lawful for every utility: To demand, collect and receive fair, just and reasonable prices, rates, fares, tolls, charges, or other compensation for each and every service rendered or to be rendered by it to any person or corporation.

To employ in the conduct and management of its business, suitable and reasonable classifications of its service, patrons, and rates; and such classification may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, and any other reasonable consideration.

(b) (Ky. Stat. 3952-29) *Service.* Every utility shall furnish adequate, efficient and reasonable service and may establish reasonable rules and regulations governing the conduct of its business and the conditions under which it shall be required to render service.

(c) (Ky. Stat. 3952-30) *Schedules.* Under such rules and regulations as the commission may prescribe, every utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and collected or enforced. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the commission may prescribe.

(d) (Ky. Stat. 3952-31) *Adherence to Schedule.* No utility shall directly or indirectly, by any device whatsoever or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such utility than that prescribed in the schedule, or schedules, of such utility, applicable thereto, then filed in the manner prescribed in this act; nor shall any person receive or

accept any service from any utility for a compensation greater or less than that prescribed in such schedule.

(e) (Ky. Stat. 3952-32) *Discrimination.* No utility shall as to rates or service make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. Provided, that nothing herein contained shall prevent any utility from granting free or reduced rate service to its officers, agents or employees, including physicians and attorneys, or the exchange of such free or reduced rate service between any utility and other utility for their respective officers, agents and employees, including physicians and attorneys; nor to prevent any utility from granting free or reduced rate service to the United States, or to charitable and eleemosynary institutions and persons engaged in charitable and eleemosynary work; nor to prevent any utility from granting free or reduced rate service with the object and for the purpose of providing relief in times and cases of flood, general epidemic, pestilence or other calamitous visitation. The terms "officers" and "employees" shall include furloughed, pensioned and superannuated officers and employees, and persons who have become disabled or infirm in the service of such utility. Further notice must be given the commission and its agreement obtained for such reduced rate service, except in case of an emergency in which instance the commission shall be notified at least five days after such service is rendered. No utility shall established or maintain any unreasonable difference as to rates or service either as between localities or as between classes of service for doing a like or contemporaneous service under the same or substantially the same conditions. The commission may determine any question of fact arising under this section.

§ 6. *Procedure.*

* * * * *

(d) (Ky. Stat. 3952-36) *Rehearing.* After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty days after the service of the order upon it, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for rehearing, and the commission may grant and hold such hearing on said matters. The commission shall either grant or refuse an application for rehearing within twenty days after the filing of same. Failure by the commission to act upon such application within that period shall be deemed a refusal thereof. Notice of such hearings shall be given as required with respect to original hearings. Upon such rehearings any party may offer additional evidence which could not, with reasonable diligence have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate, or affirm its former orders, and make and enter such order as it may be deemed necessary.

* * * * *

§ 7. *Court Review.*

(a) (Ky. Stat. 3952-44) Any party to a proceeding before the commission, or any utility affected by an order of the commission, may within twenty days after service upon it of the commission's order or from the time when the commission has failed to act within the period prescribed in Section 6 (d), commence an action in the circuit court for Franklin County or any other court of competent jurisdiction against the commission as defendant to vacate or set aside such order or determination on the ground that it is unlawful or unreasonable.

If a petition for rehearing has been made as provided in Section 6 (d) of this act, the right to commence an action against the commission shall be continued

for a period of twenty days from the service of the final order in such rehearing upon the party desiring to commence the action.

* * * * *

(f) (Ky. Stat. 3952-49) *Burden of Proof.* In all trials, actions or proceedings arising under the provisions of this act or growing out of the exercise of the authority or powers granted hereunto the commission, the burden of proof shall be on the party adverse to the public service commission seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful.

(g) (Ky. Stat. 3952-50) *Submission of Evidence to Circuit Court.* The case shall be heard and decided by the Circuit Court upon the evidence submitted to the Commission as shown by the transcript provided for in Subsection (e) of this Section⁷. Upon final submission the Circuit Court shall enter a decree either sustaining the order of the Commission or setting aside and vacating same in whole or in part.

(h) (Ky. Stat. 3952-51) *Appeal to the Court of Appeals.* Either party to said action, within sixty days after the entry of the order of judgment of the circuit court, may appeal to the Court of Appeals of Kentucky, and such appeal, upon the filing thereof in the office of the Clerk of the Court of Appeals, shall be docketed and advanced in similar manner as Commonwealth cases.

§ 8. *Assessment for Maintaining Commission, and How Apportioned.*

(a) (Ky. Stat. 3952-52) For the purpose of maintaining the commission hereby established, including the payment of salaries, traveling expenses, including hotel bills, printing, rent, light, heat, water, telephone, and all other overhead expenses and the expense of regu-

lation and supervision by the commission of the utilities enumerated in Section 1 of this act, said utilities shall within thirty days after the effective date of this act pay to the State Treasurer of the Commonwealth of Kentucky a sum equal to one-twentieth of one per centum of the total value that has been assessed against the property of said utilities for the year ending December 31, 1932. This fund shall be credited to the account of the commission and shall be used to defray the cost of regulation for the year following the effective date of this act.

* * * * *

(b) (Ky. Stat. 3952-53) On or before July first, 1936, and on or before July first of each year thereafter, such expense of maintaining said commission shall be apportioned among and assessed upon said utilities by the commission in proportion to the gross earnings or receipts of such utilities derived from intrastate business for the next preceding calendar year in which the assessments are made, providing, however, that the total amount so assessed shall not in any year exceed seventy-five thousand (\$75,000.00) dollars. All such fees for the maintenance of the commission shall be paid to the Treasurer of the Commonwealth of Kentucky on or before the first day of July, 1936, and on or before the first day of July of each year thereafter.

* * * * *

(h) (Ky. Stat. 3952-59) Any such utility failing to make payment as herein provided for the maintenance of said commission shall forfeit and pay to the state one thousand (\$1,000.00) dollars, and twenty-five dollars for each day such utility refuses, neglects or fails to make such payment, which forfeiture shall not release such utility from the payment of such assessment.

* * * * *

§ 9. (Ky. Stat. 3952-61) *Penalties.*

Every officer, agent or employee of any utility as enumerated in Section 1 hereof, or other person who shall wilfully violate any provision of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand (\$1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal such utility shall forfeit and pay into the treasury, a sum not less than twenty-five (\$25.00) dollars, nor more than one thousand (\$1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility.

Actions to recover the principal amount due and the penalties under this Act shall be brought in the name of the Commonwealth of Kentucky in the Franklin Circuit Court. Whenever any utility is subject to a penalty under this Act, the Commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty, provided the commission may compromise such action and dismiss the same on

such terms as the court will approve. The principal amount due shall be paid into the State Treasury and credited to the Commission's account, but all penalties recovered by the Commonwealth of Kentucky in such action shall be paid into the State Treasury and credited to the general fund.

§ 10 (Not printed in Ky. Stat.) *Construction of Act.*

All laws or parts of laws in conflict with the provisions of this act are hereby repealed. Each section of this act is hereby declared to be separate and independent of every other section thereof, and, if for any reason any section or provision of this act shall be held to be unconstitutional or invalid, no other section or provision of this act shall be affected thereby, as the remaining parts of the act would have been passed by the General Assembly if such unconstitutional or invalid section or provision, if any, had been stricken out before the passage of this act by the General Assembly.

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CHARLES ELMORE BRODLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1937

No. 705

**PETROLEUM EXPLORATION, a Maine
Corporation, Appellant,**

vs.

**PUBLIC SERVICE COMMISSION OF
KENTUCKY, a Kentucky Body Cor-
porate, J. C. W. Beckham, Thomas B.
McGregor and James W. Cammack, Jr., . Appellees.**

**APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN
DISTRICT OF KENTUCKY**

BRIEF FOR APPELLEES

J W JONES,
Assistant Attorney General of the
Commonwealth of Kentucky, Frank-
fort, Kentucky,

Attorney for Appellees.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1937

No. 705

PETROLEUM EXPLORATION, a Maine
Corporation, - - - - - *Appellant,*

versus

PUBLIC SERVICE COMMISSION OF
KENTUCKY, a Kentucky Body Corporate,
J. C. W. BECKHAM, THOMAS B. MCGREGOR
and JAMES W. CAMMACK, JR., - - - - - *Appellees.*

BRIEF FOR APPELLEES

STATEMENT OF CASE

A comprehensive statement of this case is contained in appellant's brief on pages from 2 to 10, inclusive. That statement will not be repeated herein or supplemented, except to say that the Central Kentucky Natural Gas Company, which is one of the distributing companies purchasing gas from the appellant, sells the gas which it purchases from appellant both at wholesale and retail.

SUMMARY OF ARGUMENT

1. A FEDERAL COURT IS WITHOUT JURISDICTION TO HEAR AND DETERMINE THE APPELLANT'S COMPLAINT

(a) The requisite jurisdictional amount is not involved. The matter in controversy is the right of appel-

lant to conduct its business and charge its contract prices for gas free of regulation and interference by the Commission. There is no allegation as to the value of this alleged right of appellant.

(b) Injunctive relief to appellant is prohibited by the Johnson Act.

(c) The facts and circumstances present in this case are not sufficient to cause irreparable injury to appellant or constitute a basis for equity jurisdiction. Appellant has not exhausted its administrative remedy.

2. APPELLANT'S BUSINESS IS NOT PRIVATE, BUT IS THAT OF A PUBLIC UTILITY

(a) Appellant comes within the Kentucky statutory definition of the term "utility".

3. APPELLANT'S WHOLESALE GAS CONTRACTS WITH DISTRIBUTING COMPANIES FIXED PURSUANT TO FRANCHISES GRANTED BY MUNICIPALITIES ARE SUBJECT TO THE JURISDICTION OF THE COMMISSION.

(a) The Kentucky Constitution does not delegate to municipalities the exclusive authority to fix utility rates by contract.

(b) The Kentucky Statutes vests in the Commission the authority to modify and regulate utility rates fixed by contracts between utility companies and municipalities.

ARGUMENT

JURISDICTION

The appellees contend that a Federal court lacks jurisdiction of this case on the following grounds:

- (1) The requisite jurisdictional amount is not involved,
- (2) injunction is prohibited by the Johnson Act, and (3)

the required elements of equity jurisdiction are not present. We will now discuss these points in the order named.

THE REQUISITE JURISDICTIONAL AMOUNT IS NOT INVOLVED

Subsection 1, Section 14, Title 28, of the Judicial Code provides that a Federal court shall not have jurisdiction of a case of this kind unless the "matter in controversy exceeds, exclusive of interest and cost, the sum or value of \$3,000". In the case of *Massachusetts Protective Association v. Stephenson*, 5 Fed. Supp. 568, the court, in discussing this statute, said:

"The two words 'sum' and 'value' do not have the same significance. If they did, but one of them would have been used. 'Sum' has to do with a case where the matter in controversy is money. In such a case it is the sum of money which is in controversy that determines jurisdiction. 'Value' has to do with a case where the matter in controversy is other property or a right. In such a case it is the value of such property or right that determines jurisdiction."

In order to prove the necessary jurisdictional amount the appellant introduced testimony showing that the incidental cost of complying with the order of the Public Service Commission of Kentucky (hereinafter referred to as the Commission) would amount to a sum in excess of \$20,000. The expenses to appellant incidental to complying with the Commission's order do not represent or constitute the matter in controversy in this case. There is no controversy as to such expenses. The only matter in controversy in this case is the right of appellant to conduct its business free of any regulation or interference by the Commission. There is no allegation in the appellant's bill as to the value of its right in that respect. Appellant rests its case as to the jurisdictional amount on

the expenses which it will incur incidental to complying with the Commission's order. In the case of Brandenburg, et al. v. Doyle, 12 Fed. Supp. 342, the court said:

"From the argument and briefs submitted, the court understands the contention of plaintiffs to be that the 'matter in controversy' is a damage or injury which they will suffer by reason of the decreased value of their real estate occasioned by restriction on their right to take, possess, etc., water fowl. It seems to me this position is untenable. Whatever damage or injury they may sustain in this respect is purely incidental or collateral to the object and purposes of the suit and cannot be taken into consideration in determining the amount in controversy."

INJUNCTION IS PROHIBITED BY THE JOHNSON ACT

That part of the Johnson Act which is pertinent to this case is quoted in appellant's brief, and may be found therein on Pages 22 and 23. It is claimed by appellant that the order of the Commission involved herein does not come within the prohibition of the Johnson Act because said order was issued without a "hearing" and not after "reasonable notice", and that the order does not affect rates.

The purpose of the Johnson Act was to prevent public utilities from delaying relief to the public with respect to reasonable charges for a utility commodity by obtaining an injunction in a Federal court, and then pursue a course of prolonged litigation. In order to effectuate the intention of the Congress in passing the Johnson Act, the Act should be liberally construed.

The Commission's order involved herein was issued without a hearing, and without any notice to the appellant. The order was and is of such a nature as to eliminate any reason or necessity for a hearing or to give the appellant any advanced notice thereof. The order con-

stitutes a preliminary step in the procedure of fixing, after a hearing, reasonable prices to be charged by appellant for gas which it sells to certain retail and wholesale gas companies operating in Kentucky. The price which the appellant charges for its gas sold as aforesaid comes clearly within the definition of the term "rate" as defined in Section 3952-1 of the Kentucky Statutes, which may be found on Page 60 of appellant's brief. In passing the Johnson Act the Congress was careful not to restrict an order coming within its provisions to one which *fixes* rates. On the contrary the Congress prescribed a broad field for an order which would come within the provisions of the Act by specifying that an order which *affects* rates should come within its provisions. The order involved herein is one which affects the rates for gas now charged by the appellant. The fact that said order affects appellant's rates is the reason why appellant is so strongly resisting the enforcement of the order. Appellees earnestly invoke the provisions of the Johnson Act as a defense to appellant's claim for an injunction.

THE REQUIRED ELEMENTS OF EQUITY JURISDICTION ARE
NOT PRESENT

Section 3952-13 of the Kentucky Statutes, 1936 Edition, vests the Commission with the following power:

"The Commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction."

Section 3952-44 of the Kentucky Statutes, 1936 Edition, provides for a court review of an order of the Commission. The provisions of this statute may be found on Pages 73 and 74 of appellant's brief.

It will thus be seen that appellant is accorded a sufficient procedural remedy in the courts of Kentucky for protection of its claimed rights. Appellant has not availed itself of the prescribed remedy. It pleads expenses and possible penalties as a justification for not pursuing the prescribed remedy. If appellant is correct in its contention that the order of the Commission is invalid, the appellant may ignore the order and compel the Commission to institute mandamus proceedings. Appellant then could set up its defense and have its rights adjudicated with the right of appeal to this Court.

Appellees contend that under these circumstances there is no such irreparable injury involved as to constitute a sufficient basis for equity jurisdiction.

In the case of Bradley Lumber Co., et al. v. National Labor Relations Board, 84 F. (2d) 97, the appellants sought to enjoin the appellee from conducting a hearing as to certain alleged practices of the appellants. It was contended by appellants that the Board was proceeding illegally, and that the hearing would involve considerable expense and loss of business to appellants. In denying appellants injunctive relief, the court said:

"The appellants can have a recognition of all their just rights under the scheme of procedure set up by the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation. A bona fide resistance in such matters in order to secure a court test would not in our opinion come within the penal provisions of section 12 of the act (29 U. S. C. A. Section 162) as being a willful impeding, resisting, or interfering with the Board or its agents in the performance of their duties. No doubt an investigation may, as the bill asserts, stir up some feeling

among employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them."

Another case similar to the one above is that of *Clark, et al. v. Lindemann & Hoverson Co., et al.*, and other related cases, 88 F. (2d) 59, wherein the court said:

"The contention is made in all of the cases that the employers are engaged solely in intrastate commerce and that, therefore, the Act either does not apply to them or, if it does, it is unconstitutional. Conceding that such contentions are well founded, we think that an adequate forum has been provided by the terms of the Act for presentation and determination of these questions. That the parties may be subjected to expense, annoyance, and inconvenience is no adequate reason for invoking the aid of equity, as expense, annoyance, and inconvenience are present in some degree in all litigation; they are but incidental and burdens of civilized government."

Another case arising under the National Labor Relations Act is that of *Elliott v. El Paso Electric Company*, 88 F. (2d) 505. In that case injunctive relief was requested against a threatened investigation. In denying the relief, for want of equity, the court said:

"The investigation by the Board may cause some expense and inconvenience, but it is not the irreparable damage which equity will interfere to prevent."

A case very similar to the instant case is that of *Myers v. Bethlehem Shipbuilding Corp.*, decided during the current term of this Court. The case has not been published in permanent form, but appears in the Lawyer's Edition, Advance Opinions of the United States

Supreme Court, Volume 82, at Page 399. In that case this Court said:

"The Corporation contends that since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Law suits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

Other cases holding that grounds similar to those existing in the instant case are not sufficient for equity jurisdiction are *Dalton Adding Machine Co. v. State Corporation Commission*, 236 U. S. 699; *Richmond Hosiery Mills v. Camp*, 74 F. (2d) 200, and *Heller Bros. Co. v. Lind*, 86 F. (2d) 862.

Appellant contends that the order in question is void. The lower court held that if such contention is correct, then the appellant may safely ignore the order,

and if the Commission should proceed against the appellant by mandamus or otherwise, the appellant then could establish the invalidity of the order. In support of that conclusion the lower court cited the cases of *State Corporation Commission of Kansas, et al. v. Wichita Gas Co.*, 290 U. S. 561, and *Federal Trade Commission v. Claire Co.*, 274 U. S. 160. Another case in point is that of *Columbia Railway Gas & Electric Co. v. Blease, et al.*, 42 F. (2d) 463, which was a proceeding to enjoin the Railroad Commission of South Carolina from putting into operation a certain rate order. In refusing the motion for a restraining order, the court said:

"In addition to this, there is grave doubt in my mind as to whether the plaintiff has shown that any irreparable injury will result from a refusal to issue the restraining order. It would appear from the statutes cited that, in case of a refusal to obey the order, the only remedies for its enforcement are a penalty of \$500 (section 4819, Code of South Carolina, 1922, vol. 3) and by mandamus and contempt proceedings (section 4888, Code of South Carolina, 1922, vol. 3). If these are the only remedies, the plaintiff could assert its rights in an action brought for the penalty and also in the action of mandamus, and there would be no necessity for a resort to equity and an injunction."

MERITS

Appellant contends that the Commission is without authority and jurisdiction to investigate the reasonableness of the appellant's rates because (1) appellant's business is private, and (2) appellant's purchasers of gas in turn sell and distribute the same to the public at rates fixed by franchise contracts between said purchasers and certain municipalities which are not subject to the Commission's jurisdiction. These points will now be discussed in the order named.

APPELLANT'S BUSINESS IS NOT PRIVATE

The question as to whether appellant is engaged in a private business has heretofore been answered by the Court of Appeals of Kentucky in the case of State Tax Commission v. Petroleum Exploration, 253 Ky. 119, 68 S. W. (2d) 777. In that case, as in this case, the appellant herein contended that its business was private. The Court answered that contention by saying:

"Manifestly the case is not one where appellee is engaged in a private business. That would be true if it merely piped its own gas from its gas fields for its own use or for the sole use of a particular corporation, but that is not the case. Its pipe line is the connecting link between the gas fields and the public. Without this service the gas would not be available to the inhabitants of the four towns. In short, its business is the transportation of gas for ultimate consumption by the public, and, according to the weight of authority, it is performing a public service and has the power of eminent domain, although it does not sell directly to the consumers, but sells to others, who in turn sell and distribute the gas to the public."

The nature of the appellant's business today is the same as it was when the Court of Appeals of Kentucky characterized it as above quoted. However, the principal question for determination herein is whether appellant is a "public utility" within the meaning of that term as defined by the Kentucky Legislature, and contained in Section 3952-1 of the Kentucky Statutes, as follows:

"The term 'utility' or 'utilities', when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter, own, control, operate or manage * * * (two) any facility used or to be used for or in connection with the production, manufacture, stor-

age, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipe line to or for the public for compensation; * * *."

In determining whether the appellant is a "public utility" within the meaning of the above statutory definition of that term consideration must be given to the meaning of the prepositions "to" and "for" as used in the statute.

In Webster's New International Dictionary the word "to" is defined:

"Primarily *to* denotes the relation of approach and arrival, making its governed word denote the terminus. It indicates that toward which there is movement and at which there is arrival. Hence, it indicates anything regarded as a terminal point or limit in the direction of which, or as far as which, there is movement, continuance, action, etc."

By the same authority the word "for" is defined:

"In the most general sense, indicating that in consideration of which, in view of which, or with reference to which, anything is, is done, or takes place. Indicating the end with reference to which anything is, acts, serves, or is done."

In the Century Dictionary "for" is defined:

"In the direction of; toward; with a view of reaching. With reference to the needs, purposes or uses of. Appropriate or adapted to; suitable to the purpose, requirement, character or state of."

The Kentucky Public Service Commission Act, defining the word "utility" as above quoted, was enacted by the Legislature in 1934 and became effective June 14, 1934. It must be considered that in drafting a definition of the word "utility" the members of the Legislature took cognizance of the general practice of gas companies then existing with respect to the transmission and distribution of natural gas for use by the public. It is a matter of general knowledge that natural gas companies do not transmit and distribute gas *for* the public in the sense that the gas belongs to the public. Ordinarily the public does not purchase or own gas, but merely pays a gas utility company a certain rate for the amount of gas actually used or consumed. A member of the public who is a customer of a gas utility company is permitted and expected to use or consume as much of the company's gas as he desires. The gas remains the property of the company until actually used by the consumer. The amount of gas used by the consumer is measured by a meter, and the company is compensated therefor at a fixed rate. As this was the practice and arrangement of gas utility companies with the public at the time said Act was passed, which practice was then known to the members of the Legislature, and as the members of the Legislature deliberately used the word "for", as above indicated, it must be presumed that the members of the Legislature intended that said word should be construed to mean something other than the transportation or transmission of gas belonging to the public by a gas or pipe line company. Apparently the Legislature used the word "for" to mean the transportation or transmission of natural gas intended to be used or consumed by the public. It is reasonable to say that such gas is *for* the public and is being transmitted to the public. Giving this interpretation and construction to the words "to" and

"for" the appellant herein is a public utility company and is subject to the jurisdiction of the Commission.

The appellant contends that public service companies which sell their commodities only at wholesale are not within the definition of "utility" as contained in the Kentucky Public Service Commission Act. This question has not been determined by the courts of Kentucky. In other jurisdictions such public service companies have been held to be subject to regulation as public utilities.

Salisbury & S. Ry. Co. v. Southern Power Co., 101 S. E. 593;

North Carolina Public Service Co. v. Southern Power Company, 282 Fed. 837;

Southern Oklahoma Power Co. v. Corporation Commission, 220 Pac. 370.

The last one of these cases involves the construction of a state statute similar in language to the Kentucky statute involved herein, and also the application to that statute of a set of facts very similar to the set of facts involved in this case. The case arose in the state of Oklahoma and under the laws of that state. The definition of "public utility" contained in the Oklahoma statute reads as follows:

"The term 'public utility', as used in this act, shall be taken to mean and include every corporation, association, company, individuals, their assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public. * * * (c) For the production, transmission, delivery or furnishing electric current for light, heat or power."

The issue involved in the case as stated by the court was as follows:

“The question for determination is whether a plant engaged in the manufacture of electric energy which it furnishes under contract at the switchboard in its plant to a public utility which is engaged in the business of transmitting and distributing current to various cities of the state is a public utility, and, as such, subject to control by the corporation commission of this state.”

In deciding the question involved in the case the court said:

“It is our opinion that the statutory definition of a public utility is sufficiently broad to include a plant operated as the plant of the plaintiff in error, where it generates electricity and furnishes same under a contract to a public utility for distribution to the public. This corporation operates a plant which furnishes and supplies a commodity (electric energy) to be furnished to the public for the production of electric current for light, heat, and power. The statute does not require that the corporation furnish the commodity to the public, but, if it furnishes a commodity for the purpose of that commodity being delivered to the public for the production of light, heat, or power, it comes within the statutory definition.”

The appellant herein uses its pipe lines in connection with the furnishing, transporting and conveying of gas to and for the public. There is a continuous flow of gas from the wells to the consuming public. This flow is partially through the pipes of the appellant. When the gas is being transmitted through the appellant's pipes its known and intended designation is the public. Such an operation comes within the broad statutory definition of the word “utility”.

FRANCHISE CONTRACT RATES BETWEEN APPELLANT'S PURCHASERS AND CERTAIN MUNICIPALITIES

Appellant further contends that the appellees are without right to investigate or regulate its rates because any reduction thereof made by the appellees could not be passed on to the consuming public for the reason that appellant's purchasers of gas sell and distribute the gas to the public at rates fixed in franchise contracts between said purchasers and certain municipalities. In making this contention the appellant takes the position that the rates fixed in said franchise contracts are not subject to the jurisdiction or regulation by the Public Service Commission for the reason that Section 3952-27 of the Kentucky Statutes is invalid, as being in violation of Sections 163 and 164 of the Kentucky Constitution. Statute 3952-27 is set forth in appellant's brief on Page 70. Sections 163 and 164 of the Constitution are set forth in appellant's brief on Page 38. Said statute and said sections of the Constitution will not be repeated here.

According to the great weight of authority the general principal of law is that a contract between a municipality and a public service corporation fixing rates of a public utility service is subject to state legislative regulation and modification.

Springfield Consolidated Water Co. v. City of Philadelphia, 131 Atlanta 716;

Fink v. City of Clarendon, 282 S. W. 912;

State v. Latshaw, 30 S. W. (2d) 105;

Huntington Water Corporation v. City of Huntington, 177 S. E. 290;

City of Benwood v. Public Service Commission, 83 S. E. 295;

Niagara, Lockport & O. P. Co. v. Seneca I. & S. Co., 219 N. Y. S. 418;

Pawhuska v. Pawhuska Oil Co., 250 U. S. 394.

In the case of Niagara, Lockport & O. P. Co. v. Seneca I. & S. Co., supra, the court used the following language:

“There is no longer any doubt the power of the state, through its proper agencies, to increase or lower the rates to be charged by a public service corporation, notwithstanding the existence of a contract providing for a less or a higher rate, and that the exercise of this power does not violate the federal or state Constitution.”

This principle of law applies to contracts entered into prior to the enactment of state legislation providing for the regulation of the rates fixed in such contracts. In the case of City of Benwood v. Public Service Commission, supra, the following excerpts are taken from the court's opinion:

“The case presents squarely the question: May the Public Service Commission alter a rate that was fixed by franchise ordinance prior to the enactment of the law by which the commission was created and given powers?

* * *

“From the general powers to establish water works and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the Legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the Legislature to prescribe different rates at any time. The Legislature, not having expressly delegated to the city power by which it could inviolably agree as to the rates, could exercise power in that particular regardless of the franchise provisions. It had withheld supreme power unto itself. Neither by charter nor by subsequent legislation did it delegate to the City of Benwood authority to agree unalterably as to the rates for a stipulated period.

"The water company and the city in the making of the so-called franchise contract were bound by cognizance of the fact that their dealings were subject to future exercise of the Legislature's power over rates for water furnished the public in the locality. Hence the franchise was made subject to what the Legislature might thereafter do as to the rates dealt with by the franchise. It was subject to the Legislature's making use of the inherent power, reserved and not exclusively delegated to the City of Benwood, to supervise all public service charges. And when the Legislature in its wisdom saw fit to exercise its reserved power of supervision over the matter of public service rates by the creation of the Public Service Commission and the delegation of the power to the commission in that behalf, the rates mentioned in the franchise became subject to supervision and regulation by the Public Service Commission.

* * *

"Yet it is most earnestly insisted on behalf of the city that the contract is inviolable, and that to uphold the powers of the Public Service Commission to the extent of allowing the commission to change the rates would in effect abrogate the contract, contrary to the constitutional inhibitions against the enactment of any law impairing the obligation of a contract. In the light of what we have said, this position cannot be sustained. Nothing that was binding in the contract will be impaired. By it the State was not bound. The contract related to a subject matter belonging to the State. The State had not given the city the power or agency to contract away its right thereto for a given time. The contract having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the State in claiming its own, when it was not bound by the contract. The supervision and regulation of the rates by the State, through the

Public Service Commission, does not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation does not therefore impair the obligation of a contract."

An examination of Section 164 of the Kentucky Constitution will disclose that any grant therein to a municipality to fix or regulate utility rates is only by implication. Any such authority which is thus granted to a municipality is permissive only and not exclusive. The Kentucky Legislature possesses all powers and authority not prohibited to it by the Constitution. Therefore, any power or authority which is not exclusively granted to cities by Section 164 of the Constitution is reserved to the people, and may be exercised by them through the Legislature. In this connection consideration should be given to Sections 3 and 4 of the Kentucky Constitution. Section 3 provides in part as follows:

"* * * and every grant of a franchise privilege or exemption, shall remain subject to revocation, alteration or amendment."

Section 4 provides in part as follows:

"All power is inherent in the people; and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property."

The delegation to municipalities of the exclusive power to fix and regulate utility service rates must be by express terms which are free of any doubt. Thus in the case of *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, this Court said:

"It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be

charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. * * * But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear and all doubts must be resolved in favor of the continuance of the power. * * * It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

This same principle of law is announced by the court in the case of *City of Richmond v. Chesapeake & Potomac Telephone Company*, 105 S. E. 127. In that case the court said:

"Where express power to fix telephone rates is not given a municipality, it is subject to the general law passed pursuant to the Constitution, and the constitutionally created commission may be authorized by statute to revise rates established by a municipal franchise conferred on a telephone company. The state may direct the company to raise its rates above those fixed by the franchise, if it is necessary to secure effective service, and so far as the city is concerned there is no constitutional objection on the ground of impairment of a contract obligation."

The case of *Sambor v. Philadelphia Rapid Transit Co.*, 27 Fed. (2d) 406, is very similar in principle to the question now under consideration in the instant case. In that case the Federal District Court said:

"There is no impairment of the obligation of a contract when it is carried out in accordance with

its terms and the contract there was read (as the present contract has been read by the state courts) as including among its terms that it was subject to the exercise of a police power of the state. There are two provisions of the Constitution of Pennsylvania, each of which in verbiage confers an absolute power. One grants to municipalities the power to consent or refuse to railway companies permission to occupy streets; the other reserves to the state the exercise, through the Legislature, of its police powers. If there is conflict between the two, some one must declare the true meaning of the Constitution in respect to which of these provisions is dominant and controlling. It must be that this meaning is to be declared by the courts, and, as the meaning to be found is that of a state Constitution, it must be found by the courts of the state. The courts of Pennsylvania have ruled that the meaning of the state Constitution is that every transaction and every contract, the law of which is the law of the state, has incorporated in it that it is subject to the exercise of the police power of the state.

“As the contract before us thus contains this provision, it follows that the enforcement of this provision of the contract is no impairment of its obligation and that the quoted clause of the national Constitution has in further consequence no application, and the bill should be dismissed, with costs, for want of equity.”

What have the courts of Kentucky said with respect to the powers of municipalities under Section 164 of the State Constitution? In the case of *Kentucky Utilities Co. v. Board of Commissioners*, 254 Ky. 527, 71 S. W. (2d) 1024, the Court of Appeals of Kentucky held that the provisions of Sections 163 and 164 of the Kentucky Constitution do not strip the Legislature of all power and authority relative to the matters mentioned therein. Also in the case of *Southern Bell Telephone and Telegraph Co. v. City of Louisville*, 265 Ky. 286, 96 S. W.

(2d) 695, the Court of Appeals of Kentucky, in speaking on this subject said:

"Section 163 merely prohibits a telephone company from erecting its poles or other apparatus along, over, under, or across the streets, alleys, or public grounds of a city without first obtaining the consent of the proper legislative body of such city. Section 164 provides that no city shall grant a franchise or privilege for a term exceeding 20 years, and requires it to receive bids therefor publicly, after due advertisement, and to award same to the highest and best bidder. It provides for restrictions on a municipality in granting a franchise or privilege, though it has been held that by implication power is conferred upon a municipality to contract with the public utility at the time the franchise is granted. The power conferred upon municipalities to enter into contracts fixing rates in the first instance for public utility service does not deprive the state of its right to exercise its police power of regulating rates. The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power. * * * I find nothing in Section 164 of the Constitution indicating that the state has been deprived of the right to exercise this power, and, that being true, a franchise granted by a municipality is granted subject to the right of the state to exercise its police power in this respect. A municipality may be granted the power to make irrevocable contracts as to rates and the exclusive power of regulation either by constitutional provision or legislative enactment, but the presumption that such a surrender of power has been made will not be indulged unless the grant is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted."

Appellant contends, however, that this statement of the Court of Appeals of Kentucky is dictum, and that the question involved herein has not been presented to the

Kentucky court. If that be true, then this Court should decide the question in accordance with the case of *R. R. Commission, et al. v. Los Angeles R. Corp.*, 280 U. S. 145, wherein it was said:

"Our attention has not been called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This Court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its power to tax."

The constitutionality of the Public Service Commission Act of Kentucky was upheld by the Court of Appeals of Kentucky in the case of *Southern Bell Telephone and Telegraph Co. v. City of Louisville*, supra, and in the case of *Smith v. Southern Bell Telephone & Telegraph Co.*, 268 Ky. 421, 104 S. W. (2d) 961.

In view of the foregoing authorities it seems that there can be no doubt that the Kentucky Public Service Commission has jurisdiction of and possesses the power and authority to regulate the rates for gas provided for in franchise contracts. The municipalities have the right to fix the initial rates by franchise contracts. Even an individual consumer has the right to contract with a utility company for a particular rate. In both cases, however, the rate or rates thus fixed are subject to regulation by the said Commission. The rate or rates remain binding on the parties to the contracts until changed by the Commission.

However, the distributing companies which purchase gas from complainant are entitled to obtain their gas from complainant at reasonable rates, irrespective of the right of the Public Service Commission to regulate rates fixed by franchise contracts. *Carey v. Corporation Commission*, 33 P. (2d) 788, is a case directly in point. It was contended in that case that the wholesale gas company's rates were not subject to regulation by the state agency because any reduction in rates could not be passed on to the consumers. The facts with respect to that point and the decision of the court thereon are stated in the opinion as follows:

"Each of these towns operates its own gas distributing system, and buys its gas from the company at its city limits. This gas is purchased under a written contract (separate for each town) specifying the charges and has several years to run. Each town petitioned for a reduction in gate rate charges despite the contracts. These petitions were heard, and upon complete hearing, the rates were found to be excessive, and ordered reduced accordingly!

"The first proposition argued by Company is want of jurisdiction of the commission over these parties for the purpose of regulating directly or indirectly the rates or charges affecting a municipally owned and operated public utility. It is asserted that the corporation commission is not given the authority to regulate the affairs of a municipally owned and operated public utility, in so far as its rates, services, etc., are concerned within its city limits, and therefore it is no concern of the corporation commission what it pays for its gas supply. It is further argued, admitting for the sake of argument the commission has such power, that each situation must show the existence of a status affected with a public interest to justify the interposition of the paramount authority of the corporation commission as regards the contracts by which a municipality purchases a commodity to be dispensed by its utility plant; and because the corporation commission can-

not follow reduction in gate rate cost to a municipally owned and operated public utility to its necessary ultimate designation, the consumer at the burner tip, no public interest is involved.

"We have carefully considered this record and do not find in it any evidence of an attempt on the part of the corporation commission to exercise control, within the town limits, of rates, charges, services, etc., of the municipally owned and operated plants. We are therefore not called upon herein to determine whether the corporation commission can exercise supervision, regulation; and control over the rates, charges, services, etc., of a municipally owned and operated public utility as regards its patrons.

"But the towns, as owners and operators of these plants, are purchasers of gas, and if they purchase it from the public service company within the definition of our Constitution, art. 9, sec. 34, and ch. 93, Sess. Laws 1913, they are entitled to the same protection and relief against overcharge and partiality on the part of the public service company as any other purchaser, be the purchaser an individual, a private corporation, public service company, or a municipality. It is because Company is a public service company, within the definition of the Constitution and laws, supra, if it is, and the towns are its patrons, then the corporation commission's authority arises.

"* * * The record shows that Company produces, buys, transports, and sells natural gas, all within Oklahoma, by this particular line. We therefore hold that the commission had jurisdiction of this matter to regulate the rate charges of Company to these towns, in the interest of the public. Any contracts it has made regarding its services and rates must fall before the commission's proper orders."

The proceeding which the Commission has instituted against the appellant is for the purpose of determining the reasonableness of the charges which appellant makes

for gas which it sells to be used by the public, and, in the event it is found that said charges are unreasonable, to fix said charges at a reasonable amount. In the event a reduction is ordered by the Commission, the Commission will, upon the order becoming final, issue other and appropriate orders directing the purchasers of gas from appellant to reduce their rates to the public proportionally so that the public will receive the benefit of any reduction made in appellant's rates. This procedure is simple, and is commonly followed by rate regulatory bodies of the various states.

CONCLUSION

For all of the foregoing reasons it is urged that the judgment of the lower court be affirmed.

Respectfully submitted;

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of the Commonwealth of
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SUPREME COURT OF THE UNITED STATES.

No. 705.—OCTOBER TERM, 1937.

Petroleum Exploration, Inc., Appellant,	}	Appeal from the District Court of the United States for the Eastern District of Kentucky.
vs.		
Public Service Commission of Kentucky,		
et al.		

[May 2, 1938.]

Mr. Justice REED delivered the opinion of the Court.

This is an appeal from a final decree dismissing appellant's bill of complaint for want of jurisdiction in equity. It was entered by the United States District Court for the Eastern District of Kentucky sitting with three judges under Judicial Code Section 266. 21 F. Supp. 254. The appellant sought to enjoin the Public Service Commission of Kentucky from prosecuting an investigation of wholesale rates for gas marketed by contract in Kentucky by appellant, on the ground that any regulation of the rates charged by appellant to its customers would be beyond the statutory power of the Commission, since the appellant was not a public utility, and would result in a deprivation of property without due process, a denial of equal protection of the laws, and a violation of the contracts clause of the Federal and State Constitutions, affecting contracts entered into prior to the passage of the regulatory act¹ of the General Assembly of Kentucky. As grounds for equitable relief, it was alleged that there was no adequate remedy and that irreparable injury would be inflicted upon appellant by the large expense entailed in preparation for the investigation.

Appellant is a corporation solely of the State of Maine, engaged in the production and purchase of natural gas at various fields in Kentucky and the transmission of that gas through wholly intrastate pipe lines to distributing agencies at the "city gates" of various municipalities of that Commonwealth. Appellant sells to three distributing agencies: a partnership, a corporation entirely free of connection with appellant, and a corporation in which ap-

¹ Acts of 1934, c. 145, as amended by Acts of 1936, c. 92.

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pellant owns a dominant interest. It offers to sell and sells its commodity by separate contracts only to the distributing agencies named in the bill. All of these agencies, with one immaterial exception, are the owners of unexpired franchises purchased from the respective municipalities which they serve. Either by these franchises or by supplementary contract, the rates are fixed for retail sales of gas. Acting pursuant to statutory provisions authorizing investigations of the rates of defined utilities, the Public Service Commission of Kentucky issued on May 29, 1937, an order, pertinent provisions of which are set forth in the margin,² reciting that appellant is an operating utility subject to the Commission's

² "Notice of Investigation and Order to Show Cause

"Whereas, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

"Whereas, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

"Whereas, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

"Whereas, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine-Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

"Whereas, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

"Now, Therefore, Notice is Hereby Given, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

"Whereas, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

"Now, Therefore, it is Ordered:

"1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

[Sections 2 and 3 omitted here relate to a requirement for the submission of information on contracts between appellant and other parties. Existence of such contracts was denied by appellant, and no evidence to establish them was offered.]

"4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

"Notice is Hereby Given to the Petroleum Exploration, Inc., of the above order of the Commission.

"Dated at Frankfort, Kentucky, this 29th day of May, 1937."

jurisdiction, setting a date for a public hearing, and ordering appellant to appear at such hearing and present evidence of the reasonableness of its rates and charges, and also to make its records available for examination.

Appellant filed a plea to the Commission's jurisdiction, in substance setting up the objections subsequently urged in the bill under consideration. The Commission overruled this plea and reset the investigation for hearing on the merits. The appellant filed an application for a rehearing of this order. Though the Commission has not formally passed upon this application it admits that it intended and threatened to proceed with the investigation, determine and fix a fair rate for appellant's gas, and that it would have so proceeded but for the temporary restraining order obtained by appellant upon the filing of the bill in question.

Appellant's bill alleged that it was the obvious purpose of the Commission to lower appellant's rates, that these rates were not subject to the regulatory jurisdiction of the Commission, that any reduction would violate the Fourteenth Amendment, and impair the obligations of its contracts, in contravention of the contracts clauses of the State and Federal Constitutions. It was further alleged that the investigation, and the orders entered therein, are unlawful and unreasonable, and, if further prosecuted, would put appellant to considerable unlawful and needless expense. The Commission filed an answer asserting that appellant was subject to its regulatory jurisdiction. It denied any purpose on its part to attempt to lower the contract price which appellant charged the distributing agencies but averred that it would institute and conduct a special investigation and proceeding to determine a fair and reasonable price or rate to be charged by appellant and to fix said price or rate.

The majority opinion of the District Court held that as the order challenged could be enforced only by judicial proceedings, there existed no immediately threatened irreparable injury or damage to the appellant within the equity jurisdiction of the District Court. Without any consideration of the merits, the bill was dismissed. The assignments of error attack this conclusion. We affirm the decree of the District Court.

First.—The point is made by appellees that injunction is prohibited by the Johnson Act of May 14, 1934, c. 283, § 1, 48 Stat. 775, 28 U. S. C. § 41(1). This act withdraws from the dis-

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strict courts jurisdiction of any suit to enjoin the enforcement of any order of a state administrative commission where such order "(1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." The Johnson Act does not apply here because the order complained of, i. e., that of May 29, 1937, was entered without notice or hearing. Though it is entitled a "Notice of Investigation and Order to Show Cause," which would be an appropriate method of initiating an investigation, in fact the order commands appellant to produce certain evidence on a designated date, and not merely to show cause on that date why evidence should not be produced. The order of June 29, 1937, overruling the plea to the jurisdiction, is not final but is pending on an application for rehearing.

Second.—This proceeding was begun under the provisions of section 24(1) of the Judicial Code, 28 U. S. C. § 41(1). Jurisdiction was challenged by the Commission on the ground that the value of the matter in controversy was not in excess of \$3,000. To show the requisite amount, appellant alleged that it would be necessary to expend \$25,000 to present the evidence required by the order. It was found by the District Court from the testimony at the trial that "the expense to plaintiff of complying with said orders would be more than \$3000.00 in employing appraisers, geologists, engineers, accountants, etc., to show the original and historical cost of its properties, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes."

The purpose of this proceeding is to stop the investigation of the rates under the order issued. Since the necessary expense of producing the information demanded by the order exceeds the jurisdictional amount, the value of the matter in controversy is at least this sum. This purpose or object is analogous to those sought in injunctions to restrain a continuing trespass, where the value of the matter in controversy includes the cost of remedying the condition as part of the value of the matter in controversy, namely, the prevention of interference with plaintiff's rights.³ Other examples are found in a

³ *Glenwood Light Co. v. Mutual Light Co.*, 239 U. S. 121, 125. The pleadings and proof in the present case do not in terms raise the question of the value of the right to conduct business free of interference by the Commission. *Scott v. Donald*, 165 U. S. 107; cf. *Glenwood Light Co. v. Mutual Light Co.*, *supra*, 124.

suit to enjoin the enforcement of a tax statute, where the amount of the tax is the value of the matter in controversy,⁴ and in a suit to enjoin enforcement of an order to install and maintain a track, where the value of the matter in controversy is the cost of compliance.⁵ Where "expenses incident to compliance" with a regulatory statute exceed \$3,000, the jurisdiction is clear.⁶ There is no contention here either that the Commission's order left appellant with any less expensive alternative, or that the worth of appellant's entire business is less than \$3,000. In undertaking to enjoin this investigation, the cost incident to making a showing required by the Commission is not collateral or incidental to the purpose of the injunction, but a threatened expense from which relief is sought. Whether such irrecoverable cost is an irreparable injury against which equity will protect is considered later in this opinion. The District Court had jurisdiction of the cause, as a federal court.

Third.—We next consider whether the suit must be dismissed pursuant to Section 267 of the Judicial Code, 28 U. S. C. §. 384, which declares that no suit in equity shall be sustained "where a plain, adequate, and complete remedy may be had at law." Though this contention was not raised below by the Commission, "either the trial court or the appellate may, of its own motion, take the objection."⁷ For determination of the adequacy of this remedy we must here assume the allegations of appellant that, unless an injunction is granted, irreparable injury will flow from its compliance with the order of May 29.

It is settled that no adequate remedy at law exists, so as to deprive federal courts of equity jurisdiction, unless it is available in

⁴ *Healy v. Ratta*, 292 U. S. 263.

⁵ *Western & Atlantic R. v. Railroad Comm. of Georgia*, 261 U. S. 264.

⁶ *Packard v. Banton*, 264 U. S. 140, 142, 143.

⁷ See *Twist v. Prairie Oil & Gas Co.*, 274 U. S. 684, 690. Although the objection does not go to the jurisdiction of the court as a federal court and may be waived and not considered if not timely raised (*Reynes v. Dumont*, 130 U. S. 354, 395), if it be obvious that there is an adequate remedy at law, the court acts *sua sponte* to preserve the courts of equity as a forum for extraordinary relief, in accordance with the legislative direction of section 267 of the Judicial Code. *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black 545, 550; *Wright v. Ellison*, 1 Wall. 16, 22; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 486; *Henrietta Mills v. Rutherford County*, 281 U. S. 123, 128. Cf. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160. It is a question of "whether the case is one for the peculiar type of relief" granted by courts of equity. *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 69.

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the federal courts.⁸ If appellant ignores the Commission's order, action for recovery of penalties for the violation of the order may be instituted by the Commonwealth of Kentucky. Ky. Stat. Ann. (Carroll's 8th ed., Baldwin's 1936 revision) §§ 3952-13 and -61. But this proceeding could neither be begun nor removed to the federal court. Apart from the difficulty of maintaining such an action in the federal courts, in view of its penal nature, the State would be proceeding as plainiff to enforce its laws; its complaint would not be grounded on the Constitution or laws of the United States, and there would not be diversity of citizenship, the States not being "citizens" within the Judicial Code.⁹ There is equitable jurisdiction to enjoin the proposed investigation of appellant's rates, if the order of May 29, quoted above, carries a threat of imminent, irreparable injury.

Fourth.—The bill asks injunctive relief to restrain the Commission from further prosecuting the "investigation" into the price of gas sold under appellants contracts to the distributing agencies. Two decisions dealing with orders for furnishing information have recently been handed down by this Court.¹⁰ In both cases this Court dealt with the merits of the respective orders, determining that there was no constitutional basis for saying that "any person is immune from giving information appropriate to a legislative or judicial inquiry." Here there is no need to consider the validity of the challenged order. To justify the use of the extraordinary power of a court of equity something more must be involved than an application of a statute in an unconstitutional manner against complainant. There must be an allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction.¹¹ The one most frequently relied upon in constitutional cases, and pleaded here, is irreparable injury.¹² To

⁸ *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 69, and cases cited; *Chicago B. & Q. R. Co. v. Osborne*, 265 U. S. 14, 16.

⁹ *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 63; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 188; *City Bank Co. v. Schnader*, 291 U. S. 24, 29.

¹⁰ *Natural Gas Co. v. Slattery*, 302 U. S. 300, 306; *Arkansas Louisiana Gas Co. v. Department of Public Utilities*, No. 645, October Term 1937, decided April 25, 1938.

¹¹ *Dows v. Chicago*, 11 Wall. 108; *Cruikshank v. Bidwell*, 176 U. S. 73, 81; *McChord v. Louisville & Nashville R. Co.*, 183 U. S. 483, 495; *Shelton v. Platt*, 139 U. S. 591, 596; *Boise Artesian Water Company v. Boise City*, 213 U. S. 276, 281.

¹² See *Irreparable Injury in Constitutional Cases*, 46 Yale Law Journal 255 (1936).

furnish the information required by the order will cost \$25,000, arising from the necessity of preparing for the hearing on rates. Is this irrecoverable expense a threatened irreparable injury which a court of equity will guard against by injunction? Whether or not equitable relief will be granted rests in the sound discretion of the court.¹³

It is true that the injury which flows from the threat of enforcement of an allegedly unconstitutional, regulatory state statute with penalties so heavy as to forbid the risk of challenge in proceedings to enforce it, has been generally recognized as irreparable and sufficient to justify an injunction.¹⁴ The Commission urges that since there is ample opportunity for the appellant to contest in a state court any effort to regulate or punish for disobedience of orders, with ultimate review by this Court, there is no irreparable injury, and that the dangers of lowered rates and threatened punishments can be overcome by opposition when an effort is made to enforce them. The case of *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, where an effort was made to secure an injunction against enforcement of a Federal Trade Commission order to produce information, has been cited as a precedent. There were heavy penalties for violation of that order¹⁵ but the opinion discussed the issues from the standpoint of failure to exhaust administrative remedy.¹⁶ Appellant here insists that it is compelled to choose between compliance, at a heavy cost, or non-compliance with obvious risks of severe, though non-recurring and non-cumulative, penalties;¹⁷ and that to stand by subjects

¹³ *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 70.

¹⁴ *Ex parte Young*, 209 U. S. 123, 165; *Terrace v. Thompson*, 263 U. S. 197, 215, 216; *Packard v. Banton*, 264 U. S. 140, 143.

¹⁵ Sections 9 and 10 of the Act of September 26, 1914, c. 311, 38 Stat. 722, 15 U. S. C. §§ 49, 50.

¹⁶ *Cf. Dalton Adding Machine Co. v. State Corporation Commission*, 236 U. S. 699.

¹⁷ Ky. Stat. Ann. § 3952-61 provides: *Penalties*.—Every officer, agent or employee of any utility as enumerated in section 1 hereof, or other person who shall willfully violate any provisions of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand (\$1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the com-

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appellant to the further risk that the Commission will fix its rates on the Commission's evidence alone.¹⁸ We may assume, without deciding, that the risk of these penalties would be sufficiently great to require the interposition of a court of equity to protect appellant against a regulatory order.

Compliance with this order, however, subjects appellant only to an expense in preparing for and carrying out an investigation. It is not suggested that the expense is disproportionate to the business of appellant, valued by the District Court as in excess of \$1,500,000, and involving sales of about one billion cubic feet per annum, at a price of \$350,000. No order has been entered fixing rates or regulating conduct. The necessity to expend for the investigation or to take the risk for non-compliance does not justify the injunction. It is not the sort of irreparable injury against which equity protects.¹⁹

The weight to be given complaints of irrecoverable and irreparable cost and damage in proceedings to enjoin hearings, initiated by a federal governmental agency in a matter alleged by complainants to be beyond the agency's powers, was considered in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. —, No. 181, October Term 1937, decided January 31, 1938. In an effort to enjoin hearings by the National Labor Relations Board, the Corporation alleged (see 303 U. S. at —):

"that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the Corporation, not

mission, for every such violation, failure or refusal such utility shall forfeit and pay into the treasury a sum not less than twenty-five (\$25.00) dollars, nor more than one thousand (\$1,000.00) dollars, for each such offense, said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case be deemed to be the act, omission or failure of such utility." There is also provision for proceedings by mandamus or injunction to compel obedience to the orders of the Commission. Ky. Stat. Ann. § 3952-13.

The minority opinion below construed this as follows: "When the violator is an individual, the penalties for failure to comply with the orders of the Public Service Commission are not more than \$1,000, or confinement in jail for not more than six months, or both, and if a corporation, not less than \$25 or more than \$1,000 for each violation, the enforcement thereof to be by the Franklin circuit court of the commonwealth of Kentucky." 21 F. Supp. 254, at 259.

The appellant argues in this Court that failure to produce the evidence may subject it to a fine and its officers and agents to criminal penalties. Neither the majority below nor the Commission in this Court expresses a contrary view.

¹⁸ Ky. Stat. Ann. § 3952-14.

¹⁹ Cf. *Lawrence v. St. L. S. F. Ry.*, 274 U. S. 588, 592.

only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the Corporation and its employees, and thus seriously impair the efficiency of its operations."

Further allegations pointed out similar substantial damages in preceding investigations. See Note 4 *idem*. While other grounds were factors in our conclusion to reverse the decree for an injunction, we said (p. —):

"Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

It may be suggested that in the *Bethlehem Shipbuilding* case the employer had not presented to the Board its contention of constitutional immunity, and that proof of that immunity would have constituted no greater injury if presented to the Board than the courts, whereas here the appellant has already been overruled by the Commission on the question of appellant's constitutional immunity, and so would be subject to greater expense by presenting further evidence on another matter before the Commission than by proceeding in an equity court and there contesting the Commission's jurisdiction. This was the argument presented to the Court, but not discussed, in *United States v. Illinois Central R. Co.*, 244 U. S. 82, 85-86. The situation is still controlled by the abiding and fundamental principle of this aspect of the *Bethlehem Shipbuilding* case, that the expense and annoyance of litigation is "part of the social burden of living under government."²⁰ The authority in other courts is in accord.²¹

Fifth.—Our conclusion that this is not a threatened injury justifying intervention is strengthened by a balancing of conveniences. By the process of injunction the federal courts are

²⁰ *Bradley Lumber Co. v. N. L. R. B.*, 84 F. (2d) 97, 100 (C. C. A. 5).

Whether expense, in this instance, may be avoided by a challenge of the interlocutory orders of the Commission on the plea of appellant to the jurisdiction (see Ky. Stat. Ann. § 3952-44), is not within our province to decide.

²¹ The suggestion that an administrative agency be enjoined from further, and expensive, proceedings after its allegedly erroneous determination of jurisdiction was considered and rejected in *Chamber of Commerce v. Federal Trade Commission*, 280 Fed. 45, 48-49 (C. C. A. 8); *Pittsburgh & W. Va. Ry. Co. v. Interstate Commerce Commission*, 280 Fed. 1014, 1015-6 (App. D. C.); *Paramino Lumber Co. v. Marshall*, 18 F. Supp. 645, 647 (D. Wash.). Compare *State ex rel. Carrau v. Superior Court*, 30 Wash. 700; *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 572-573.

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asked to step at the threshold, the effort of the Public Service Commission of Kentucky to investigate matters entrusted to its care by a statute of that Commonwealth obviously within the bounds of state authority in many of its provisions. The preservation of the autonomy of the states is fundamental in our constitutional system. The extraordinary powers of injunction should be employed to interfere with the action of the state or the depositaries of its delegated powers, only when it clearly appears that the weight of convenience is upon the side of the protestant.²² "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state."²³ The Kentucky statute in question contains detailed provisions for hearings and judicial review.²⁴ These include notice, procedural rules before the Commission, right to counsel, production of evidence, service of orders, rehearing, process for parties and witnesses, depositions, record of proceedings, review of orders by court and appeal to the state court of last resort. The compulsory and punitive powers of the Commission are exercised through judicial process. When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention.

Affirmed.

Mr. Justice McREYNOLDS concurs in the result.

Mr. Justice STONE concurs, except that he expresses no opinion on the applicability of the Johnson Act.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

²² *Gilchrist v. Interborough Co.*, 279 U. S. 159, 207; *Pennsylvania v. Williams*, 294 U. S. 176, 185; *Matthews v. Rodgers*, 284 U. S. 521, 525; cf. *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 338.

²³ *Hawks v. Hamill*, 288 U. S. 52, 61.

²⁴ Ky. Stat. Ann. §§ 3952-33 to -51 inclusive.